Supreme Court, U. S.
FILED
JUL 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities,

Appellants

v.

JOHN E. WHITE, *Appellee.*

Appeal From a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities,

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v.

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Appeal From a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

---

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rules 13 (2) and 15, file this their Statement of the basis upon which it is contended that the Supreme

Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question and should exercise such jurisdiction in this case.

OPINION BELOW

The Three-Judge Court delivered its written opinion in connection with the entry of the decree in question on the 27th day of April, 1977 and such opinion was filed in the United States District Court for the Middle District of Georgia Albany Division on the 28th day of April, 1977. Copy of such Opinion is attached to this Jurisdictional Statement.

JURISDICTION

The appeal herein is from a final decree made and entered by a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division, specially constituted under 42 USC § 1973(c) and 28 USC § 2284 upon the Plaintiff's application for an interlocutory and permanent injunction to restrain the enforcement, operation or execution of a rule of the Dougherty County, Georgia Board of Education, which rule Plaintiff contends was in violation of the Voting Rights Act of 1965, 42 USC § 1971, et seq., 42 USC § 1983, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The final decree appealed from was made and entered on the 28th day of April, 1977. Notice of Appeal was filed in the United States District Court for the Middle District of Georgia, Albany Division, on the

27th day of May, 1977. Copies of such final decree and Notice of Appeal are attached hereto.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 USC § 1253 and 42 USC § 1973(c).

Rule 58 of the Dougherty County, Georgia Board of Education that is involved is as follows:

> "POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

The Three-Judge Court held that Rule 58 was subject to the requirements of Section 5 of the Voting Rights Act of 1965, 42 USC § 1973(c) and that the requirements of such section had not been met and, as a result thereof, the Three-Judge Court enjoined the enforcement of Rule 58 by the Dougherty County, Georgia Board of Education.

QUESTIONS PRESENTED

Section 5 of the Voting Rights Act of 1965, 42 USC § 1973(c) provides that whenever a state or political subdivision "which enacts or seeks to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the

United States District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or color, or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty (60) days. The principal and only question presented is:

(1) Whether Section 5 of the Voting Rights Act of 1965, 42 USC § 1973(c) applies to a rule promulgated by a local Board of Education which provides that any employee of such Board of Education school system who becomes a candidate for elective political office must take certain prescribed leaves of absence without pay.

STATEMENT OF THE CASE

On June 11, 1976 John E. White, a black employee of the Dougherty County, Georgia Board of Education, instituted an action against the Dougherty County, Georgia Board of Education, et al., alleging that he was an adult black citizen of the United States and an employee of the Dougherty County, Georgia Board of Education and had been since 1966; that he was employed on a 12-month basis, and in 1972 announced his candidacy for election to the Georgia House of Representatives; that the Dougherty County, Georgia Board of Education adopted Rule 58 which provides as follows:

> "POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

John E. White further alleged that he qualified for such office in June, 1972, was required to take a leave of absence from his employment, without pay, upon such qualification, that he was unsuccessful in the Democratic Primary Election held in August, 1972, and returned to his employment in September, 1972.

John E. White further alleged that he again qualified to run in June, 1974 for election to the Georgia House of Representatives and again granted a leave of absence from employment, without pay, effective June 12, 1974, that he was successful in the Democratic Primary Election in August, 1974, and was elected to the Georgia House of Representatives on November 5, 1974, and was reinstated to his employment on November 18, 1974.

Plaintiff further alleged that on June 8, 1976 he again qualified to run for election to the Georgia House of Representatives and was again required to take a leave of absence, without pay, effective June 8, 1976.

The plaintiff contended that Rule 58 was in violation of the Voting Rights Act of 1965, 42 USC § 1973(c), and, therefore, Rule 58 was unenforceable and its application to the plaintiff was unlawful.

John E. White prayed for the convening of a Three-Judge District Court and a preliminary and permanent injunction enjoining the Dougherty County, Georgia Board of Education from enforcing or implementing Rule 58.

The Dougherty County, Georgia Board of Education, et al., answered and denied that Rule 58 was subject to the requirements of the Voting Rights Act of 1965, 42 USC § 1973(c).

Stipulations were entered into between the parties and the matter was submitted to the Three-Judge Court for determination by that court on Motions for Partial Summary Judgment filed by both parties, and the Three-Judge Court in its decision held that Rule 58 was subject to the Voting Rights Act of 1965, 42 USC § 1973(c).

THE QUESTION PRESENTED IS SUBSTANTIAL.

The Three-Judge Court in its decision has held that the Voting Rights Act of 1965, 42 USC § 1973(c) applies to a local board of education which enacts a rule setting forth the requirements of that local board of education which permit one of its employees to run for public office and at the same time maintain a job or position with such local board of education. The rule under consideration does not enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting. As a matter of fact the Dougherty County, Georgia Board of Education could not and cannot prescribe a voting qualification or prerequisite to voting, a standard, practice or procedure with respect to voting for the simple reason that the Dougherty County, Georgia Board of Education has no authority, say-so, power or jurisdiction in connection with elections.

The substantial question presented is: Are the courts going to expand beyond outer limits of all reasoning Section 5 of the Voting Rights Act of 1965, 42 USC

§ 1973 (c) so as to include therein the action of any governmental entity that has absolutely nothing to do with elections. Must a school board in order to enact a rule establish working guidelines for its employees institute a declaratory judgment action in the District Court of the District of Columbia seeking approval of such rule or submit to the Attorney General of the United States before implementation. This question is of prime importance not only to each and every school district, but to each and every governmental entity that may desire a full days work for a full days pay.

CONCLUSION

This Court has jurisdiction of this appeal. The question presented is substantial, and it is respectfully suggested that this Court may find this case an appropriate one for reversal without further argument.

Respectfully submitted,

PERRY, WALTERS, LIPPITT & CUSTER

By: JESSE W. WALTERS
Jesse W. Walters

Attorneys for Appellants

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CIVIL ACTION No. 76-29-Alb

JOHN E. WHITE, *Plaintiff*,

v.

DOUGHERTY COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Before MORGAN, Circuit Judge; BOOTLE, Senior District Judge; OWENS, District Judge.

OWENS, District Judge:

In 1965 Congress enacted the Voting Rights Act to eliminate the racial discrimination in voting that Congress believed to still exist in a minority of the states of these United States, chiefly those in the traditional South. As contemplated, only eleven states were brought within the coverage [1] of the Act—South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii, and one county in Idaho. *South Carolina*

---

[1] As originally enacted, the law was to apply

"in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964 any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964." 42 U.S.C.A. Sec. 1973b(b).

The appropriate determinations subjecting Georgia and its political subdivsions to the Act were made on August 6, 1965, and published in the Federal Register on August 7, 1965. 30 Fed. Reg. 9897.

v. *Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S.Ct. 803 (1966).

Section Five of the Act, 42 U.S.C.A. § 1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the U. S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U. S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of such change until Section Five is complied with. *Allen* v. *Board of Elections*, 393 U.S. 544, 22 L.Ed. 2d 1, 89 S.Ct. 817 (1969).

While the word "vote" is broadly defined in the Act, to wit: "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes case. . ." 42 U.S.C.A. § 1971(e), the outer limits of the applicability of the Act remained in doubt and subject to argument until the Supreme Court decided *Allen, supra*, in 1969.

The *Allen* decision disposed of appeals in three separate cases from Mississippi and one from Virginia. The Mis-

sissippi cases concerned (1) a Mississippi law authorizing county officials to change from district to at-large elections, (2) a Mississippi law eliminating the option of certain counties to elect or appoint a county superintendent of education and specifying that the superintendent shall be appointed, and (3) a Mississippi law changing the requirements for independent candidates running in general elections. The Virginia case involved a bulletin issued by the Virginia Board of Elections changing procedures for illiterates to vote. Pointing to the broad definition of the word "vote" and the legislative history of the Act, the Court rejected the invitation to narrowly construe the applicability of the Act to just the voting process and proceeded to find that the Act was "intended to reach any state enactment which altered the election law of a covered state *in even a minor way. . . .*" *Allen, supra,* at 566; 22 L. Ed. 2d at 17; 89 S. Ct. at ——. (emphasis added). The Virginia bulletin and each of the Mississippi laws were held to be encompassed by the Act, and each District Court was instructed "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." Id. at 572, 22 L. Ed 2d at 21, 89 S. Ct. at ——.

Relying on Section Five as broadly interpreted, the plaintiff John E. White, a black citizen of Dougherty County, Georgia, filed his complaint alleging that in May 1972 while employed by the Dougherty County Board of Education, he publicly announced his intention to become a candidate for a seat in the House of Representatives of the General Assembly of Georgia. Plaintiff White states that he thus became the first black in recent years to seek election in Dougherty County as a Representative to the General Assembly. In June 1972 the defendant Dougherty County Board of Education for the first time adopted the following policy known as Rule 58:

> "POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective po-

litical office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for each elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto.

As required by this rule the plaintiff took a leave of absence without pay from the time of his qualification as a Democratic primary candidate in June 1972 until his defeat in the Democratic primary election in August 1972. In June 1974 he again qualified to run for the same office and was required to take a leave of absence from his employment on June 12, through and including his winning the August 1974 primary election and the November 1974 general election. Following the general election of November 5 he was reinstated in his employment on November 18, 1974. The court has not been advised whether or not he had opposition in the general election. On June 8, 1976, he again qualified to run for the same office and was required to take a leave of absence without pay through and including the August 1976 Democratic primary election. He won that election, did not have opposition in the general election, and was reinstated to his employment on September 8, 1976, preceding the November general election. Plaintiff's affidavit shows that as a result of these leaves of absence without pay, he was deprived of the following amounts of monetary compensation:

1972	$2,810.00
1973	4,780.00
1976	3,750.00

Rule 58 has not been submitted for United States District Court for the District of Columbia judicial approval or to the Attorney General for him to have the opportunity to disapprove, all pursuant to Section Five. Plaintiff contends that Rule 58 is encompassed by Section Five and that its use must be enjoined until Section Five is

complied with. Defendants assert that even the discussed expansive interpretation of Section Five does not reach what is purely a personnel policy of a local public board of education.

The facts as recited have been stipulated, cross motions for partial summary judgment have been filed, briefs have been submitted, and the issue of whether or not Rule 58 is subject to the procedures of Section Five is ready for decision by this district court of three judges.

This district court of three judges is required to resolve any dispute as to the coverage of Section Five or, said more directly, to determine "whether such changes have the *potential* for diluting the value of the Negro vote and are within the definitional terms of § 5." *Georgia* v. *United States,* 411 U.S. 526, 534, 36 L. Ed 2d 472, 481, 93 S. Ct. 1702, —— (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, *i.e.,* whether or not the enactment in truth and fact has a discriminatory purpose or effect. *Perkins* v. *Matthews,* 400 U.S. 379, 383, 27 L.Ed 2d 476, 482, 91 S.Ct. 431 —— (1971).

Section Five as judicially interpreted sweeps broadly over all phases of the electoral system so as to include even the statutory change of the date by which a declaration of candidacy must be filed, *Hadnott* v. *Amos,* 394 U.S. 3581, 22 L. Ed 2d 336, 89 S.Ct. 1101 (1969); changes of the location of polling places and municipal annexations enlarging the number of voters. *Perkins, supra;* and the enlargement of the distance from the polling place within which campaigning is allowed, *Clayton* v. *North Carolina State Board of Elections,* 319 F. Supp. 915 (E.D. N.C. 1970).

As the Supreme Court said in *Georgia* v. *United States, supra,* in deciding whether or not Georgia's 1972 legislative reapportionment plan was subject to § 5:

> ". . . Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters.
>
> • • •
>
> "The applicability of § 5 to election law changes such as those enacted by Georgia in its 1972 plan was all but conclusively established by the opinion of this Court in Allen v. State Board of Elections, 393 US 544, 22 L Ed 2d 1, 89 S Ct 817. The Allen opinion, dealing with four companion cases, held that § 5 applied to a broad range of voting law changes, and was constitutional as applied. With respect to the reach of § 5, we held that '[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.' Id., at 566, 22 L Ed 2d 1. . . .
>
> "Had Congress disagreed with the interpretation of § 5 in Allen, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the Allen case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5. Pub L 91-285, 84 Stat 314, 315. We can only conclude then, that Allen correctly interpreted the congressional design when it held that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' " 393 US at 565-566, 22 L Ed 2d 1." *Id* at 531-533, 36 L. Ed 2d at 479-80, 93 S.Ct at ——.

Section Five, then, is more than a narrow guarantee against interference with the actual casting of a ballot. It is instead an all-encompassing protection against abridgement of an *effective* vote and to that end prohibits prior to required District of Columbia federal scrutiny, the enforcement of enactments of every nature or sort which touch the electorate's ability to have a choice as well as its right to choose. In short, it applies to modifications of the political process and all that that process entails, including the implementation of any policy implemented by a covered "State or political subdivision", 42 U.S.C.A. § 1973c, which restricts the ability of citizens to run for office.

Rule 58 of the Dougherty County Board of Education is such a modification of the political process. By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives. As in *Allen, supra,* and *Hardnott, supra,* it is an "increased barrier" for a candidate and for that reason it is a "procedure with respect to voting" that is subject to the requirements of Section Five.

To paraphrase, *Georgia* v. *United States, supra,* the applicability of Section 5 to rules and regulations which place restrictions upon the opportunity of black citizens to offer for elective office was all but conclusively established by *Allen, supra.*

Rule 58 being subject to the requirements of Section Five and those requirements having not been met, the enforcement of Rule 58 must be enjoined by this court.

It Is Therefore Ordered, Adjudged and Decreed that the defendants, their agents, officers, servants, employees and attorneys, and all persons in active concert with them who receive actual notice of this order by personal service

or otherwise, are hereby enjoined from further using and enforcing in any respect Rule 58 of the Dougherty County Board of Education.

This three-judge court having finally resolved the issue properly before it, does hereby dissolve itself and remand the case to the originating judge for such other and further proceedings consistent with this opinion as may be required, including determination of an appropriate remedy.

So Ordered, this 27th day of April, 1977.

/s/ Lewis R. Morgan
Lewis R. Morgan, *Circuit Judge*
United States Court of Appeals

/s/ W. A. Bootle
W. A. Bootle
Senior United States District Judge

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action No. 76-29-ALB.

(Three Judge)

John E. White, *Plaintiff*,

v.

Dougherty County, Georgia Board of Education; R. H. Warren, Chairman, Dougherty County Board of Education; Franklin U. Cross, J. P. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, *Defendants*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dougherty County, Georgia Board of Education; R. H. Warren, Chairman, Dougherty County Board of Education, Franklin U. Cross, J. P. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, Defendants above named, and Appellants on appeal, hereby appeal to the Supreme Court of the United States from the final Order enjoining the defendants from further using and enforcing Rule 58 of the Dougherty County Board of Education for the reason that the Rule is subject to the requirements of Section 5 of the Voting Rights Act, 42 USC § 1973(c) and the requirements of Section 5 have not been met. The Order was entered in

this action on April 27, 1977 and the Order was filed April 28, 1977.

This appeal is taken pursuant to 28 USC 1253 and 42 USC 1973(c).

This the 27th day of May, 1977.

PERRY, WALTERS, LIPPITT & CUSTER

By: JESSE W. WALTERS
Jesse W. Walters, as Attorney for Defendants—Dougherty County, Georgia Board of Education: R. H. Warren, Chairman, Dougherty County Board of Education; Franklin U. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, Appellants.

GEORGIA,
DOUGHERTY COUNTY:

CERTIFICATE OF SERVICE BY AFFIDAVIT

I, JESSE W. WALTERS, an Attorney with the law firm of PERRY, WALTERS, LIPPITT & CUSTER, of Albany, Georgia, Attorneys of Record for Defendants, Dougherty County, Georgia Board of Education; R. H. Warren, Chairman, Dougherty County Board of Education; Franklin U. Cross, J. P. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, Appellants herein, depose and say that on the 27th day of May, 1977 I served a copy of the foregoing Notice of Appeal to the Supreme Court on John E. White, Plaintiff and Appellee herein by depositing in the United States Mail with first class postage prepaid, addressed to John R. Myer, Counsel of Record for Plaintiff at 2415 National Bank of Georgia Building, Atlanta, Georgia 30303.

I further state that all parties required to be served by the Rules of the Supreme Court of the United States with a copy of the Notice of Appeal to the Supreme Court of the United States have been served.

This the 27th day of May, 1977.

/s/ JESSE W. WALTERS
Jesse W. Walters,
Attorney for Defendants

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, individually and in their official capacities, *Appellants*.

VS.

JOHN E. WHITE, *Appellee*.

On Appeal from a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

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DOCKETED JULY 21, 1977

PROBABLE JURISDICTION NOTED MARCH 20, 1978

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Relevant Docket Entries

Date	
6/11/76	Filed complaint, issued summons and delivered to US Marshal for service.
6/24/76	Filed Answer of Defendants, with Certificate of Service thereon.
7/20/76	Filed Plaintiff's First Interrogatories to Defendants, with Certificate of Service thereon.
8/23/76	Filed Defendants' Answers to Plaintiff's First Interrogatories, with Certificate of Service thereon.
12/14/76	Filed Stipulations by the parties.
12/14/76	Filed Defendants' Motion for Partial Summary Judgment, with brief in support thereof.
12/16/76	Filed Plaintiff's Motion for Partial Summary Judgment and brief in support thereof.
12/16/76	Filed Affidavit of Plaintiff John E. White.
12/16/76	Filed Affidavit of John R. Myer, Esq.
4/28/77	Filed Opinion of Judge Lewis R. Morgan, Circuit Judge, US Court of Appeals, Judge W. A. Bottle, Senior U.S. District Judge and Judge Wilbur D. Owens, Jr., US Ditsrict Judge remanding the case to the originating judge for such other and further proceedings consistent with this opinion as may be rendered, including determination of any appropriate remedy.
5/27/77	Filed Notice of Appeal to the Supreme Court of United States with Certificate of Service thereon.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION

No. 76-29-ALB

(Three Judge)

FILED JUNE 11, 1976

JOHN E. WHITE, *Plaintiff*,

vs.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, individually and in their official capacities, *Defendants*.

Complaint

I.

This action for declaratory, injunctive and monetary relief is instituted to redress rights guaranteed by the Voting Rights Act of 1965, 42 U.S.C. Sec. 1971, *et seq.*, 42 U.S.C. Sec. 1983, and the Fourteenth and Fifteenth Amendments, United States Constitution. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. Sec. 1971(d), 28 U.S.C.

Sec. 1343(3)(4), and 28 U.S.C. Sec. 1331. Plaintiff also seeks declaratory relief pursuant to 28 U.S.C. Secs. 2201 and 2202. The amount in controversy exceeds $10,000.

II.

Plaintiff requests the convening of a three-judge district court pursuant to 42 U.S.C. Sec. 1971(g).

III.

Plaintiff, JOHN E. WHITE, is an adult Black citizen of the United States residing in Albany, Georgia.

IV.

Defendant, DOUGHERTY COUNTY BOARD OF EDUCATION, exists pursuant to the Constitution and laws of the State of Georgia, and is charged with the responsibility and function of establishing, maintaining, and operating the public school system of Dougherty County, Georgia; R. H. WARREN is Chairman, Dougherty County Board of Education. He is sued in his individual and official capacity; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., are members of the Dougherty County Board of Education. They are sued in their individual and official capacities. PAUL ROBERTSON is Superintendent of the Dougherty County School System. He is sued in his individual and official capacity.

V.

Plaintiff has been employed by the defendants in the Dougherty County School System since 1966 as an Assistant Coordinator of Student Personnel Services. Plaintiff is employed on a twelve month basis. In 1972, plaintiff announced his candidacy for election to the Georgia House of Representatives. In May, 1972, the defendants adopted "Rule 58" which provides as follows:

"Political Office. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

VI.

On information and belief, plaintiff was the first Black candidate from Albany for the Georgia House of Representatives.

VII.

Plaintiff qualified for the office in June, 1972. Pursuant to the then recently adopted Rule 58, plaintiff was required to take a leave of absence from his employment without pay immediately upon his qualification for the election. Plaintiff was unsuccessful in the Democratic primary election held in August, 1972. Plaintiff returned to employment with defendants in September, 1972.

VIII.

In June, 1974, plaintiff again qualified to run for election to the Georgia House of Representatives. Again, defendants, pursuant to Rule 58, required plaintiff, effective June 12, 1974, to take a leave of absence from employment without pay during the pendency of his candidacy. Plaintiff was successful in the Democratic primary election held in August, 1974. During the period following the primary election until the General Election held on November 5, 1974, plaintiff continued to be denied employment. Plaintiff was elected to the Georgia House of Representatives at the General Election held November 5, 1974. Plaintiff was reinstated in his employment with defendants effective November 18, 1974.

IX.

On June 8, 1976, plaintiff again qualified to run for election to the Georgia House of Representatives. Defendants, pursuant to Rule 58, then required plaintiff to again take a leave of absence without pay, effective June 8, 1976, and plaintiff is currently in that status and will remain so, through the Primary Election to be held in August, 1976, and if successful at that election, through the General Election to be held in November, 1976.

First Cause of Action

X.

The actions of the defendants complained of herein are in violation of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1971, *et seq.*, in that defendants have instituted a "voting qualification or prerequisite to vote, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964" without submitting or obtaining the required approval of either the United States Attorney General or the United States District Court for the District of Columbia, as required by Section Five of the Voting Rights Act of 1965. Defendants are a "covered jurisdiction" within the meaning of the Voting Rights Act.

XI.

Because defendants have failed to comply with the Voting Rights Act of 1965, Rule 58 is unenforceable and the defendants' application of Rule 58 to plaintiff has been unlawful.

Second Cause of Action

XII.

The actions of defendants complained of herein have deprived, under color of state law, plaintiff of rights se-

cured by the Voting Rights Act of 1965, the Fourteenth and Fifteenth Amendments, United States Constitution, 42 U.S.C. Sec. 1983.

Third Cause of Action

XIII.

The actions of defendants complained of herein have vio-violated plaintiff's rights, as guaranteed by the Due Process Clause, Fourteenth Amendment, United States Constitution, in that, Rule 58 denies arbitrarily, capriciously and irrationally, plaintiff his rights to liberty and property to pursue his employment.

Fourth Cause of Action

XIV.

The actions ofdefendants complained of herein have violated plaintiff's rights as guaranteed by the Equal Protection Clause, Fourteenth Amendment, in that, the Rule 58 discriminates on the basis of race.

Fifth Cause of Action

XV.

The actions of defendants complained of herein have violated plaintiff's rights as guaranteed by the Fifteenth Amendment, United States Constitution, in that, Rule 58 discriminates and abridges, on the basis of race, plaintiff's rights.

WHEREFORE, plaintiff respectfully prays that this Court:

1. Convene a three-judge district court, pursuant to 42 U.S.C. 1971(g);

2. Declare that Rule 58 is in violation of the Voting Rights Act to 1965, the Fourteenth and Fifteenth Amendments, United States Constitution, and 42 U.S.C. 1983;

3. Preliminary and permanently enjoin defendants from enforcing or implementing Rule 58;

4. Grant plaintiff an award of money equal to the amount of back pay lost because of defendants' application of Rule 58 applied to plaintiff as complained of herein;

5. Grant plaintiff an award of reasonable attorney's fees;

6. Grant such other and further relief as the Court deems meet and proper.

/s/ JOHN R. MYER

John R. Myer
CROSLAND, MYER & RINDSKOPF
2415 National Bank of Georgia Bldg.
Atlanta, Georgia 30303

ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION

No. 76-29-ALB

FILED JUNE 24, 1976

[TITLE OMITTED IN PRINTING]

Answer of Defendants

Now come the Defendants and file these their responses to the Complaint heretofore filed, and for response show the Court as follows:

First Defense

The Complaint fails to set forth a cause of action against these Defendants upon which relief can be granted.

Second Defense

1. Answering paragraph 1 of the Complaint, these defendants admit that the action alleges that it is for declaratory, injunctive and monetary relief and further to redress rights guaranteed by the Voting Rights Act of 1965, 42 USC § 1971, et seq., 42 USC § 1983, and the Fourteenth and Fifteenth Amendments, United States Constitution. Further, these defendants admit that plaintiff alleges that jurisdiction of this Court is involved pursuant to the statutes set forth in paragraph one and that the plaintiff also alleges that he seeks declaratory relief pursuant to 28 USC §§ 2201 and 2202.

Further answering paragraph 1 of the Complaint, these defendants show that they have in no way deprived the plaintiff of any rights guaranteed as alleged in paragraph 1 of the Complaint and deny that the amount in controversy exceeds $10,000.00.

2. Answering paragraph 2 of the Complaint, these defendants show that the Complaint filed in this matter does not require the convening of a three-judge district court pursuant to 42 USC § 1971(g).

3. These defendants admit the allegations of paragraph 3 of the Complaint.

4. These defendants admit the allegations of paragraph 4 of the Complaint.

5. These defendants admit the allegations of paragraph 5 of the Complaint.

6. These defendants are without sufficient knowledge with which to form a belief as to the truth of the allegations of paragraph 6 of the Complaint.

7. These defendants admit the allegations of paragraph 7 of the Complaint.

8. These defendants admit the allegations of paragraph 8 of the Complaint.

9. These defendants admit the allegations of paragraph 9 of the Complaint.

10. These defendants deny the allegations of paragraph 10 of the Complaint and further show that these defendants have not instituted a "voting qualification or prerequisite to vote, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964".

11. These defendants deny the allegations of paragraph 11 of the Complaint.

12. These defendants deny the allegations of paragraph 12 of the Complaint.

13. These defendants deny the allegations of paragraph 13 of the Complaint.

14. These defendants deny the allegations of paragraph 14 of the Complaint.

15. These defendants deny the allegations of paragraph 15 of the Complaint.

16. These defendants deny each and every allegation of the Complaint not herein admitted, controverted or specifically denied.

WHEREFORE, these defendants having fully answered, pray that they be discharged.

PERRY, WALTERS, LIPPITT & CUSTER

/s/ JESSE W. WALTERS

Jesse W. Walters

Attorneys for Defendants

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-ALB

(Three Judge)

FILED JUNE 20, 1976

[TITLE OMITTED IN PRINTING]

Plaintiff's First Interrogatories to Defendants

To: Jesse W. Walters, Esq.
P. O. Box 527
Albany, Georgia 31702,

Attorney for Defendants.

PLEASE TAKE NOTICE that plaintiff hereby requests, pursuant to Rule 33 of the Federal Rules of Civil Procedure, that defendants answer under oath within thirty (30) days of service hereof, the following written interrogatories. After the answer to each interrogatory, you are required to identify separately and in a manner suitable for use as a description in a subpoena all sources of information (documentary, human or other) and all records maintained by defendant or any other person or organization upon which you rely in answering the interrogatory or which pertain or relate to the information requested. These interrogatories shall be deemed continuing to the time of trial. Responses to one interrogatory or part thereof may be incorporated by reference in response to other interrogatories or parts of interrogatories where clarity of answer

will not be compromised. In lieu of identifying particular documents, said document may be attached at the option of defendant to the responses to these interrogatories.

Each of the following interrogatories shall be deemed continuing and you are requested to provide, by way of supplementary answers thereto, such additional information as may hereinafter be obtained by you or any person acting on your behalf (including your counsel of record) which information will augment or otherwise modify any answer now given to the attached interrogatories. Any such supplementary responses are to be filed and served upon counsel of record for the plaintiff within thirty (30) days after receipt of such information but not later than the time of trial or hearing.

1. Please state the names and addresses of persons serving as members of the Dougherty Board of Education from 1970 to the present, and for each such person, indicate the terms of service.

2. State the names and business addresses of all persons who promulgated and adopted Rule 58 of the Dougherty County Board of Education.

3. State the names and business addresses of all persons not identified in your answer to the preceding interrogatory who participated in the formulation, development, promulgation and adoption of Rule 58 and who would have information concerning its adoption.

4. State in detail the reasons why Rule 58 was adopted by the Dougherty County Board of Education and identify the source or sources upon which you rely for your answer to this interrogatory.

5. State whether in the past or present, any employee of the Dougherty County Board of Education (other than plaintiff) has ever run for public office while an employee of the Dougherty County Board of Education.

6. If your answer to the preceding interrogatory is affirmative, for each such person identified, please state:

(a) His/her name, race, address and past or present position with the Dougherty County Board of Education;

(b) The public office sought and the dates of such candidacy or service as an elected official;

(c) Whether such employee was required to take a leave of absence from employment without pay or otherwise was subjected to any adverse employment action.

7. Please identify with sufficient specificity for a description in a subpoena duces tecum all written documents, including studies, reports, correspondence, memoranda, or other regarding Rule 58 and for each such documents, state the name, business address of the custodian of the written document.

8. State whether the Dougherty County Board of Education had ever adopted or implemented any rule or rules concerning candidacy for or service in public office prior to the adoption of Rule 58.

9. If your answer to the preceding interrogatory is affirmative, please identify in detail any such rule or rules, including whether in written form and when adopted or implemented.

10. Do you contend that the Dougherty County Board of Education is not a "covered jurisdiction" within the meaning of the Voting Rights Act of 1965.

11. Please state the names, business titles, race and dates of leave of all other employees of the Dougherty County Board of Education who have been required to take leaves pursuant Rule 58.

12, Please state in detail the reasons why Rule 58 was not submitted to the United States Attorney General or the United States District Court for the District of Columbia pursuant to Section Five of the Voting Rights Act of 1965 prior to its implementation.

/s/ JOHN R. MYER

John R. Myer
2415 National Bank of Georgia Bldg.
Atlanta, Georgia 30303
(404) 522-1934

Attorney For Plaintiff

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION

No. 76-29-ALB

(Three Judge)

FILED AUGUST 23, 1976

[TITLE OMITTED IN PRINTING]

Defendants' Answers to Plaintiff's First Interrogatories

In response to Interrogatories served upon the Defendants, by the Plaintiff in the above case, the Defendants answer as follows:

1. R. H. Warren, III, Warren & Brimberry, Inc., P. O. Box 1110, Albany, Georgia 31702—has served from 1969 to present; Felix Marbury, Marbury Pecans, 1440 Gillionville Road, Albany, Georgia 31707—served from 1964 until June 1976; Morgan Murphy, First State Bank & Trust Company, P. O. Box 8, Albany, Georgia 31702—has served from 1970 to present; Dr. J. P. Cheevers, 309 Whitney Avenue, Albany, Georgia 31701—has served from 1968 to present; Harvey J. Cohen, P. O. Box 507, Albany, Georgia 31702—has served from 1970 to present; Franklin U. Cross, P. O. Box 4332, Albany, Georgia 31702—has served from 1969 to present; Charles L. Nesbitt, 1441 South Mock Road, Albany, Georgia 31705—has served from 1970 to present;

Fred Sumter, First Federal Savings and Loan Association, P. O. Box 648, Albany, Georgia 31702—appointed July, 1976.

2. All persons listed in Number 1 above except Fred Sumter.

3. J. J. Cordell, Superintendent (retired), 1615 Third Avenue, Albany, Georgia 31707; Howard D. Waters, Director, Albany Area Technical School (retired), 917 Sixth Avenue, Albany, Georgia 31701; Jesse W. Walters, Attorney, 409 North Jackson Street, Albany, Georgia 31701; Paul B. Robertson, Asst. Superintendent, 601 Flint Avenue, P. O. Box 1470, Albany, Georgia 31702.

4. Rule 58 was adopted by the Dougherty County Board of Education because the Board of Education deemed it necessary to have a rule which would set forth the policy of the Board pertaining to personnel within the school system offering for elective office and serving in an elective office if elected thereto.

5. None, so far as can be ascertained.

6. Not applicable.

7. Minutes of Board of Education meeting of June 12, 1972; minutes of Board of Education meeting of September 9, 1974; and minutes of Board of Education meeting of October 14, 1974.

8. No.

9. Not applicable.

10. Yes.

11. None, however, no employee of Dougherty County Board of Education other than plaintiff has offered for public office.

12. See answer to Number 10.

GEORGIA,

DOUGHERTY COUNTY:

Personally appeared before the undersigned officer duly authorized by law to administer oaths, PAUL B. ROBERTSON, who, after being duly sworn, deposes and on oath says that he is Superintendent of the Dougherty County School System, and the answers contained in the foregoing DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES are true and correct to the best of his knowledge and belief.

/s/ PAUL B. ROBERTSON

Paul B. Robertson

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-ALB.

(Three judge)

FILED DECEMBER 14, 1976

[TITLE OMITTED IN PRINTING]

Stipulations

Come now the parties, through their undersigned attorneys, and hereby stipulate for the purposes of this action the following stipulations of fact.

1. The Dougherty County Board of Education is the body empowered by the Constitution of the State of Georgia with the responsibility for administering the Dougherty County, Georgia public school system.

2. Plaintiff John E. White is a Black citizen of the United States residing in Albany, Georgia.

3. Plaintiff has been employed by the Dougherty County Board of Education as an Assistant Coordinator of Student Personnel Services since November, 1966.

4. On June 12, 1972, the Dougherty County Board of Education adopted Rule 58.

5. Pursuant to Rule 58, plaintiff has had to take leaves of absence without pay from his position with the Dougherty County Board of Education during the periods of his

candidacy for the office of representative in the Georgia House of Representatives:

1972: June, 1972—September, 1972.

1974: June 12, 1974—November 18, 1974.

1976: June 8, 1976—September 8, 1976.

6. No submission of Rule 58 has been made by the Dougherty County Board of Education or its authorized agents for approxal pursuant to the Voting Rights Act of 1965.

The foregoing matters were stipulated and agreed upon between John R. Myer, Attorney for Plaintiff, and Jesse W. Walters, Attorney for Defendants, in telephone conversation, this 13th day of December, 1976.

/s/ JESSE W. WALTERS

Jesse W. Walters

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-ALB.

FILED DECEMBER 14, 1976

[TITLE OMITTED IN PRINTING]

Motion for Partial Summary Judgment

The defendants move the Court to enter a partial Summary Judgment in their favor against Plaintiff on the ground that there is no genuine issue as to any material fact pertaining to the alleged violation of the Voting Rights Act of 1965 on the part of the defendants. This being true the defendants are entitled to judgment as a matter of law.

This motion is based upon the pleadings and any stipulations of record.

This 13th day of December, 1976.

PERRY, WALTERS, LIPPITT & CUSTER

/s/ JESSE W. WALTERS

Attorneys for Defendants

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-ALB.

(Three judge)

FILED DECEMBER 16, 1976

[TITLE OMITTED IN PRINTING]

Plaintiff's Motion for Partial Summary Judgment

Comes now the Plaintiff, through his undersigned attorney, and moves this Court, pursuant to Rule 56, F.R.C.P. for an order granting partial summary judgment in his favor on Count One of the Complaint. Specifically, Plaintiff moves this Court to enter an order declaring that defendants are required to obtain approval, pursuant to Section 5 of the Voting Rights Act of 1965, of Rule 58 of the Dougherty County Board of Education, and enjoining the enforcement of Rule 58 until such approval and ordering an award of lost wages and attorneys fees.

This Motion for Partial Summary Judgment is based upon the pleadings and interrogatories on file in this case, the Affidavits attached hereto, and the Stipulation of the parties entered into for the purposes of this Motion.

This 13th day of December, 1976.

Respectfully submitted,

/s/ JOHN R. MYER

John R. Myer
CROSLAND, MYER & RINDSKOPF
2415 National Bank of Georgia Building
Atlanta, Georgia 30303
404-522-1934

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CIVIL ACTION No. 76-29-ALB.
(Three judge)

FILED DECEMBER 16, 1976
[TITLE OMITTED IN PRINTING]

Affidavit of Plaintiff John E. White

STATE OF GEORGIA)
COUNTY OF DOUGHERTY) ss

Comes now JOHN E. WHITE before the undersigned Notary Public and on oath deposes and says as follows:

1. I am the plaintiff in this action. I am an adult Black citizen of the United States residing in Albany, Georgia.

2. I have been employed by the Dougherty County Board of Education since November, 1966. During that time, I have served as an Assistant Coordinator of Student Personnel Services. Beginning in March, 1975, my working hours were changed by the Board of Education from 8:00 a.m. to 4:00 p.m. to 2:30 p.m. to 10:30 p.m.

3. In May, 1972, I informed the Director of the Albany Vocational School of my intention to run for the Georgia House of Representatives.

4. On June 10, 1972, the Dougherty County Board of Education adopted Rule 58.

5. I believe that I am the first Black citizen to run from Dougherty County for the Georgia General Assembly in many, many years; perhaps the first since the Post-Civil War Reconstruction Era.

6. I qualified to run for the office in June, 1972, and pursuant to the recently adopted Rule 58, I was required to take a leave of absence from my employment without pay. I lost the Democratic primary election in August, 1972 and returned to my employment in September, 1972.

7. In June, 1974, I again qualified to run for the Georgia House of Representatives. Again, effective June 12, 1974, I was required to take a leave of absence from my employment with the Dougherty County School Board without pay during the time of my candidacy. I was successful in the Democratic Primary election held in August, 1974. During the period of time following the primary election and until the General Election in November, 1974, I was continually denied employment because of Rule 58. I was elected to the House of Representatives in the November, 1974 General Election held on November 5, 1974. I was reinstated in my employment on November 18, 1974.

8. On June 8, 1976, I again qualified to run for re-election to the Georgia House of Representatives. Defendants, pursuant to Rule 58, again required me to take a leave of absence without pay effective June 8, 1976. I was denied employment from that date until after my re-election in the August, 1976 Democratic Primary. On September 8, 1976, I was reinstated in my position. I did not have General Election opposition in 1976.

9. I have suffered, as a result of the application of Rule 58 to my employment, loss of compensation in the following amounts:

1972—$2,810
1974—$4,780
1976—$3,750

This affidavit is given in support of my Motion for Partial Summary Judgment.

This 13 day of December, 1976.

/s/ JOHN E. WHITE

John E. White

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-Alb.

(three-judge)

FILED DECEMBER 16, 1976

[TITLE OMITTED IN PRINTING]

Affidavit of John R. Myer, Esq.

STATE OF GEORGIA)
COUNTY OF FULTON) ss

Comes now JOHN R. MYER, ESQ., before the undersigned NOTARY PUBLIC who on oath deposes and says as follows:

1. I am a member of the Bar of the State of Georgia engaged in the private practice of law. I maintain my offices at 2514 National Bank of Georgia Building, Atlanta, Georgia.

2. I represent the plaintiff, John E. White, in the above captioned action.

3. During the course of my representation of plaintiff, I received from the office of the United States Attorney General a copy of a letter dated August 26, 1976 to Mr. Paul Robertson, Superintendent, Dougherty County School System from J. Stanley Potting, Assistant Attorney General, Civil Rights Division. A copy of that letter is attached hereto as Exhibit A.

This affidavit is given in support of plaintiff's motion for partial summary judgment.

This 12th day of December, 1976.

/s/ JOHN R. MYER

John R. Myer

Exhibit A

Mr. Paul Robertson
Superintendent
Dougherty County School System
Post Office Box 1470
Albany, Georgia 31702

Dear Mr. Robertson:

It has been brought to my attention that in 1972 the Dougherty County Board of Education adopted a rule requiring employees of the school system who become candidates for elective office to take a leave of absence, without pay, during their candidacy and service in office.

Our records fail to show that this change in a standard, practice or procedure which affects voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the affect of discriminating on account of race or color. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met.

If you have any questions concerning the matters discussed in this letter, please do not hesitate to call Ms. Elizabeth Dunigan (202-739-3887) of my staff, who has been assigned to handle this matter. Please refer to File No. X7539 in any written response to this letter so that your correspondence will be properly channelled.

Sincerely,

J. Stanley Pottinger

Assistant Attorney General
Civil Rights Division

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

CIVIL ACTION No. 76-29-Alb.

FILED APRIL 28, 1977

[TITLE OMITTED IN PRINTING]

Before MORGAN, Circuit Judge; BOOTLE, Senior District Judge; OWENS, District Judge.

OWENS, District Judge:

Opinion

In 1965 Congress enacted the Voting Rights Act to eliminate the racial discrimination in voting that Congress believed to still exist in a minority of the states of these United States, chiefly those in the traditional South. As contemplated, only eleven states were brought within the coverage [1] of the Act—South Carolina, Alabama, Alaska,

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[1] As originally enacted, the law was to apply

> "in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964 any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that iess than 50 percentum of such persons voted in the presidential election of November 1964." 42 U.S.C.A. Sec. 1973b(b).

The appropriate determinations subjecting Georgia and its political subdivisions to the Act were made on August 6, 1965, and published in the Federal Register on August 7, 1965. 30 Fed. Feg. 9897.

Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii, and one county in Idaho. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S.Ct. 803 (1966).

Section Five of the Act, 42 U.S.C.A. § 1973c, provides that whenever a covered state of political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the U.S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U.S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of such change until Section Five is complied with. *Allen* v. *Board of Elections*, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969).

While the word "vote" is broadly defined in the Act, to wit: "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes case. . ." 42 U.S.C.A. § 1971(e), the outer limits of the applicability of the Act remained in doubt and subject to argument until the Supreme Court decided *Allen, supra*, in 1969.

The *Allen* decision disposed of appeals in three separate cases from Mississippi and one from Virginia. The Mississippi cases concerned (1) a Mississippi law authorizing county officials to change from district to at-large elections, (2) a Mississippi law eliminating the option of certain counties to elect or appoint a county superintendent of education and specifying that the superintendent shall be appointed, and (3) a Mississippi law changing the requirements for independent candidates running in general elections. The Virginia case involved a bulletin issued by the Virginia Board of Elections changing procedures for illiterates to vote. Pointing to the broad definition of the word "vote" and the legislative history of the Act, the Court rejected the invitation to narrowly construe the applicability of the Act to just the voting process and proceeded to find that the Act was "intended to reach any state enactment which altered the election law of a covered state *in even a minor way. . . .*" *Allen, supra,* at 566; 22 L. Ed. 2d at 17; 89 S. Ct. at ——. (emphasis added). The Virginia bulletin and each of the Mississippi laws were held to be encompassed by the Act, and each District Court was instructed "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.* at 572, 22 L. Ed 2d at 21, 89 S. Ct. at ——.

Relying on Section Five as broadly interpreted, the plaintiff John E. White, a black citizen of Dougherty County, Georgia, filed his complaint alleging that in May 1972 while employed by the Dougherty County Board of Education, he publicly announced his intention to become a candidate for a seat in the House of Representatives of the General Assembly of Georgia. Plaintiff White states that he thus became the first black in recent years to seek election in Dougherty County as a Representative to the General Assembly. In June 1972 the defendant Dougherty County

Board of Education for the first time adopted the following policy known as Rule 58:

> "Political Office. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for each elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto.

As required by this rule the plaintiff took a leave of absence without pay from the time of his qualification as a Democratic primary candidate in June 1972 until his defeat in the Democratic primary election in August 1972. In June 1974 he again qualified to run for the same office and was required to take a leave of absence from his employment on June 12, through and including his winning the August 1974 primary election and the November 1974 general election. Following the general election of November 5 he was reinstated in his employment on November 18, 1974. The court has not been advised whether or not he had opposition in the general election. On June 8, 1976, he again qualified to run for the same office and was required to take a leave of absence without pay through and including the August 1976 Democratic primary election. He won that election, did not have opposition in the general election, and was reinstated to his employment on September 8, 1976, preceding the November general election. Plaintiff's affidavit shows that as a result of these leaves of absence without pay, he was deprived of the following amounts of monetary compensation:

1972	$ 2,810.00
1973	4,780.00
1976	3,750.00

Rule 58 has not been submitted for United States District Court for the District of Columbia judicial approval or to the Attorney General for him to have the opportunity to disapprove, all pursuant to Section Five. Plaintiff contends that Rule 58 is encompassed by Section Five and that its use must be enjoined until Section Five is complied with. Defendants assert that even the discussed expansive interpretation of Section Five does not reach what is purely a personnel policy of a local public board of education.

The facts as recited have been stipulated, cross motions for partial summary judgment have been filed, briefs have been submitted, and the issue of whether or not Rule 58 is subject to the procedures of Section Five is ready for decision by this district court of three judges.

This district court of three judges is required to resolve and dispute as to the coverage of Section Five, or said more directly, to determine "whether such changes have the *potential* for diluting the value of the Negro vote and are within the definitional terms of § 5." *Georgia* v. *United States*, 411 U.S. 526 ,534, 36 L. Ed. 2d 472, 481, 93 S. Ct. 1702, —— (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, *i.e.*, whether or not the enactment in truth and fact has a discriminatory purpose or effect. *Perkins* v. *Matthews*, 400 U.S. 379, 383, 27 L.Ed. 2d 476, 482, 91 S.Ct. 431 —— (1971).

Section Five as judicially interpreted sweeps broadly over all phases of the electoral system so as to include even the statutory change of the date by which a declaration of candidacy must be filed, *Hadnott* v. *Amos*, 394 U.S. 3581, 22 L. Ed. 2d 336, 89 S.Ct. 1101 (1969); changes of the location of polling places and municipal annexations enlarging the number of voters. *Perkins, supra*; and the en-

largement of the distance from the polling place within which campaigning is allowed, *Clayton* v. *North Carolina State Board of Elections*, 319 F. Supp. 915 (E.D. N.C. 1970).

As the Supreme Court said in *Georgia* v. *United States*, *supra*, in deciding whether or not Georgia's 1972 legislative reapportionment plan was subject to § 5:

> "... Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters.
>
> • • •
>
> "The applicability of § 5 to election law changes such as those enacted by Georgia in its 1972 plan was all but conclusively established by the opinion of this Court in Allen v State Board of Elections, 393 US 544, 22 L Ed 2d 1, 89 S Ct 817. The Allen opinion, dealing with four companion cases, held that § 5 applied to a broad range of voting law changes, and was constitutional as applied. With respect to the reach of § 5, we held that '[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.' Id., at 566, 22 L Ed 2d 1. . . .
>
> "Had Congress disagreed with the interpretation of § 5 in Allen, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the Allen case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5. Pub L 91-285, 84 Stat 314, 315. We can only conclude, then, that Allen correctly interpreted the congressional design when it held that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' " 393 US at 565-566, 22 L Ed 2d 1." *Id* at 531-533, 36 L. Ed 2d at 479-80, 93 S.Ct. at ——.

Section Five, then, is more than a narrow guarantee against interference with the actual casting of a ballot. It is instead an all-encompassing protection against abridgement of an *effective* vote and to that end prohibits prior to required District of Columbia federal scrutiny, the enforcement of enactments of every nature or sort which touch the electorate's ability to have a choice as well as its right to choose. In short, it applies to modifications of the political process and all that that process entails, including the implementation of any policy implemented by a covered "State or political subdivision", 42 U.S.C.A. § 1973c, which restricts the ability of citizens to run for office.

Rule 58 of the Dougherty County Board of Education is such a modification of the political process. By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives. As in *Allen, supra,* and *Hardnott, supra,* it is an "increased barrier" for a candidate and for that reason it is a "procedure with respect to voting" that is subject to the requirements of Section Five.

To paraphrase *Georgia* v. *United States, supra,* the applicability of Section 5 to rules and regulations which place restrictions upon the opportunity of black citizens to offer for elective office was all but conclusively established by *Allen, supra.*

Rule 58 being subject to the requirements of Section Five and those requirements having not been met, the enforcement of Rule 58 must be enjoined by this court.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, servants, employees

and attorneys, and all persons in active concert with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from further using and enforcing in any respect Rule 58 of the Dougherty County Board of Education.

This three-judge court having finally resolved the issue properly before it, does hereby dissolve itself and remand the case to the originating judge for such other and further proceedings consistent with this opinion as may be required, including determination of an appropriate remedy.

So Ordered, this the 27th day of April, 1977.

/s/ Lewis R. Morgan
Lewis R. Morgan, Circuit Judge
United States Court of Appeals

/s/ W. A. Bootle
W. A. Bootle
Senior United States District Judge

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

Civil Action No. 76-29-ALB.

(Three Judge)

Filed May 27, 1977

[Title Omitted in Printing]

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Dougherty County, Georgia Board of Education: R. H. Warren, Chairman, Dougherty County Board of Education, Franklin U. Cross, J. P. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, Defendants above named, and Appellants on appeal, hereby appeal to the Supreme Court of the United States from the final Order enjoining the defendants from further using and enforcing Rule 58 of the Dougherty County Board of Education for the reason that the Rule is subject to the requirements of Section 5 of the Voting Rights Act, 42 USC § 1973(c) and the requirements of Section 5 have not been met. The Order was entered in this action on April 27, 1977 and the Order was filed April 28, 1977.

This appeal is taken pursuant to 28 USC 1253 and 42 USC 1973(c).

This the 27th day of May, 1977.

PERRY, WALTERS, LIPPITT & CUSTER

/s/ JESSE W. WALTERS

JESSE W. WALTERS, as Attorney for Defendants—Dougherty County, Georgia Board of Education: R. H. Warren, Chairman, Dougherty County Board of Education; Franklin U. Cross, J. P. Cheevers, Harvey Cohen, Morgan Murphy, Chuck Nesbitt, Felix Marbry, Jr., Members, Dougherty County Board of Education; Paul Robertson, Superintendent, Dougherty County School System, individually and in their official capacities, Appellants.

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities,

Appellants

versus

JOHN E. WHITE,

Appellee

Appeal from a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

---

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities,

Appellants

versus

JOHN E. WHITE,

Appellee

Appeal from a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

---

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States and the letter of the Office of the Clerk dated September 8, 1977, moves that

the final judgment of the district court be affirmed on the ground that the question is insubstantial and does not warrant further argument.

STATEMENT

This is a direct appeal from the final judgment of a three judge district court specially constituted pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284 entered the 28th day of April, 1977. That district court granted appellee a permanent injunction, pursuant to Section Five of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, enjoining the implementation of Rule 58 of the Board of Education of Dougherty County, Georgia, which required that employees offering for public elective office were required to take a leave of absence without pay during the period of their candidacy. The district court ruled that Rule 58 constituted a change in practice which required submission to the United States District Court or the United States Attorney General as required by Section Five of the Voting Rights Act.

Appellee concurs with the Statement of the Case as set forth in Appellants' Statement as To Jurisdiction. Appellee would add however that by letter dated August 26, 1976 the United States Attorney General advised Appellants that the change reflected by the adoption of Rule 58 was subject to the requirements of Section Five of the Voting Rights Act of 1965. In addition, Appellee John White alleged that he was the first Black citizen in recent history to seek election from Dougherty County to the Georgia State House of Representatives.

ARGUMENT

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THE QUESTION PRESENTED IS NOT A SUBSTANTIAL QUESTION.

The three judge district court held that the State of Georgia is "covered" by the pre-clearance requirements of Section Five of the Voting Rights Act of 1965. The court further held that Section Five, as broadly interpreted, sweeps "over all phases of the electoral system" including any modification to the political process. The district court ruled that "Rule 58 . . . is such a modification of the political process. By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives." (Appendix, p. 7a). Since the Appellant Board of Education had never submitted the change reflected in Rule 58 to either the United States District Court for the District of Columbia or the United States Attorney General, the enforcement and implementation of Rule 58 was in violation of Section Five of the Voting Rights Act of 1965.

The result reached by the district court is controlled by the broad interpretation of the coverage of Section Five given that section by this Court in *Allen* v. *Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); and *Georgia* v. *United States*, 411 U.S. 526 (1973). The decision of the district court below did not of course rule that Rule 58 did in fact discriminate. That decision is, in the first instance, left to the United States District Court for the District of Columbia or the United States Attorney General. The decision of the district court was limited to the question of whether this change was subject to the pre-clearance provisions of Section Five.

Finally, although not raised directly by the Appellants, the question of whether an entity such as the Board of Education, which does not register electors, is covered by Section Five is before this Court in *United States of America* v. *Board of Commissioners of Sheffield, Alabama*, No. 76-1662, probable jurisdiction noted June 27, 1977. On this question, Appellee incorporates herein by reference the Brief of the United States of America filed in that appeal.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Appellees have presented no substantial question for the decision of this Court, and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

JOHN R. MYER
1515 Healey Building
57 Forsyth Street
Atlanta, Georgia 30303
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion to affirm has been served upon Jesse W. Walters, Esquire, Post Office Box 527, Albany, Georgia 31702, counsel of record for appellants by mailing a copy of said motion to him, first class postage prepaid, addressed as above.

This 14th day of October, 1977.

ELIZABETH R. RINDSKOPF
Attorney for Appellant

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, R. H. WARREN, Chairman, Dougherty County Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities, *Appellants*

v.

JOHN E. WHITE, *Appellee*

Appeal From a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

---

BRIEF OF THE DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, ET AL.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, Board of Education; FRANKLIN U. CROSS, J. P. CHEEVERS, HARVEY COHEN, MORGAN MURPHY, R. H. WARREN, Chairman, Dougherty County CHUCK NESBITT, FELIX MARBRY, JR., Members, Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Dougherty County School System, Individually and in their official capacities, *Appellants*

v.

JOHN E. WHITE, *Appellee*

Appeal From a Three-Judge Court in the United States District Court for the Middle District of Georgia, Albany Division

---

BRIEF OF THE DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, ET AL.

OPINIONS BELOW

The three-judge district court's opinion of the 27th day of April, 1977 (J. S. App, pp. 1a-8a) is reported at 431 F. Supp. 919.

JURISDICTION

The order of the three-judge district court granting John E. White's application for an injunction under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c was entered on April 27, 1977 and filed on April 28, 1977 (J. S. App., pp. 9a-10a).

The Dougherty County Board of Education filed a timely notice of appeal on May 27, 1977 (J.S. App., pp. 9a-10a), and this Court noted probable jurisdiction on March 20, 1978. The jurisdiction of this Court derives from 42 USC § 1973c and 28 USC § 1253.

STATUTES INVOLVED

Sections 4(a), 4(b), 5, and 14(c)(2) of the Voting Rights Act of 1965, as amended, 42 USC 1973b(a), 1973b(b), 1973c and 1973 l(c)(2), provide as follows:

42 USC § 1973b.

"(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the

purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title. PROVIDED, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: PROVIDED, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that de-

nials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsec. (f)(2) of this section, he shall consent to the entry of such judgment."

42 USC § 1973b.

"(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census detremines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

42 USC § 1973c.

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or

color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: PROVIDED, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

42 USC § 1973 l(c)(2)

"(2) The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

QUESTIONS PRESENTED

1. Whether the Dougherty County, Georgia Board of Education is a covered political subdivision under the terms of section 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c.

2. Whether Section 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c applied to a rule promulgated by the Dougherty County, Georgia Board of Education which provides that any employee who becomes a candidate for elective political office must take certain prescribed leaves of absence without pay.

STATEMENT OF THE CASE

On June 11, 1976 John E. White, a black employee of the Dougherty County, Georgia Board of Education, instituted an action against the Dougherty County, Georgia Board of Education, et al., alleging that he was an adult black citizen of the United States and an employee of the Dougherty County, Georgia Board of Education and had been since 1966; that he was employed on a 12-month basis, and in 1972 announced his candidacy for election to the Georgia House of Representatives; that the Dougherty County, Georgia Board of Education adopted Rule 58 which provides as follows:

"POLITICAL OFFICE. Any employee of the school system who becames a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

John E. White further alleged that he qualified for such office in June, 1972, was required to take a leave of absence from his employment, without pay, upon such qualified, that he was unsuccessful in the Democratic Primary Election held in August 1972, and returned to his employment in September, 1972.

He further alleged that he again qualified to run in June, 1974 for election to the Georgia House of Representatives and was granted a leave of absence from his employment, without pay, effective June 12, 1974, that he was successful in the Democratic Primary Election in August, 1974, and was elected to the Georgia House of Representatives on November 5, 1974, and was reinstated to his employment on November 18, 1974.

He further alleged that on June 8, 1976 he again qualified to run for election to the Georgia House of Representatives and was again required to take a leave of absence, without pay, effective June 8, 1976.

He contended that Rule 58 was in violation of the Voting Rights Act of 1965, 42 USC § 1973c and, therefore, Rule 58 was unenforceable and its application to the plaintiff was unlawful.

John E. White prayed for the convening of a Three-Judge District Court and a preliminary and permanent injunction enjoining the Dougherty County,

Georgia Board of Education from enforcing or implementing Rule 58.

The Dougherty County, Georgia Board of Education, et al. answered and denied that Rule 58 was subject to the requirements of the Voting Rights Act of 1965, 42 USC § 1973c.

Interrogatories revealed that no employee of the Dougherty County, Georia Board of Education (other than John E. White) had ever run for public office while an employee of the Dougherty County Board of Education.

Rule 58 was adopted by the Dougherty County Board of Education because it was deemed necessary to have a rule which would set forth the policy of the Board pertaining to personnel within the school system offering for elective office and serving in an elective office if elected thereto.

It was stipulated that the Dougherty County Board of Education is the body empowered by the Constitution of the State of Georgia with the responsibility for administering the Dougherty County, Georgia public school system; that John E. White is a Black citizen of the United States residing in Albany, Georgia; that John E. White had been employed by the Dougherty County Board of Education as an Assistant Coordinator of Student Personnel Services since November, 1966; that Rule 58 was adopted on June 12, 1972; that John E. White, pursuant to Rule 58, had to take leaves of absence without pay during the periods of his candidacy for the office of representative in the Georgia

House of Representatives in 1972, 1974 and 1976; and that Rule 58 was not submitted for approval pursuant to the Voting Rights Act of 1965.

Motions for partial summary judement were filed by both parties and on the 27th day of April, 1977 the three-judge district court held that Rule 58 was subject to Section Five and its enforcement was enjoined.

SUMMARY OF ARGUMENT

The Dougherty County, Georgia Board of Education has no power or control over the electoral process and, therefore, is not a political subdivision covered by § 5 of the Voting Rights Act of 1965, as amended.

A rule adopted by the Dougherty County, Georgia Board of Education that provides that if one of its employees becomes a candidate for elective public office, such employee must take a leave of absence, without pay, during the time of campaigning, is not a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. Therefore, such rule does not fall within the purview of § 5 of the Voting Rights Act of 1965, as amended, and needs no preclearance as provided in § 5 before being put into effect.

ARGUMENT

A.

The Dougherty County, Georgia Board of Education Is Not A Political Subdivision As To Come Within The Ambit Of The Voting Rights Act of 1965, 42 USC §§ 1973-1973p.

In 1965 Congress enacted the Voting Rights Act of 1965 seeking to eliminate what it considered to be racial discrimination in voting. This legislation was directed principally toward Southern states, Georgia being one of such states.

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, is as follows:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by and State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title."

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c is as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard. practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title

> are in effect, shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's

failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Section 14(c)(2) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 l(c)(2) is as follows:

> "(2) The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

Section 4(b) of the Act, 42 U.S.C. § 1973b(b) sets forth the means and methods of determining whether or not a State comes within the provisions of the Act. Georgia came within such provisions,[1] and it is thus necessary to determine whether the Dougherty County, Georgia Board of Education is a political subdivision that comes within the provisions of the Act.

The Board of Education is a political subdivision charged with the responsibility of operating the public

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[1] 30 Fed. Reg. 9897, August 7, 1965.

schools of Dougherty County, Georgia. It has no direct or indirect functions in connection with registering voters; it has no direct or indirect functions in establishing qualifications of candidates for elective office; it has no direct or indirect functions in connection with the location of polling places; it has no direct or indirect functions in connection with the changing in any manner of election laws; it has no direct or indirect functions in connection with whether or not a candidate shall be elected by a majority or plurality vote. In short and to the point, the Board of Education has no direct or indirect functions in connection with election of public officers. How then can it be said that the Board of Education is a covered political subdivision?

It should suffice to point out that the Board of Education does not meet the definition of "political subdivision" as set forth in Section 14(c)(2) of the Voting Rights Act. However, this Court has held that the answer is not so simple. The case of *United States* v. *Board of Commissioners of Sheffield, Alabama, et al.*, ——US ——, 55 L Ed 2d 148, 98 S Ct —— (March 6, 1978), was one wherein the City of Sheffield, Alabama, acting by and through its Commissioners, attempted to change its form of government from a commission form to a mayor-council form. All prepared changes were submitted to the Attorney General for preclearance as provided in the Voting Rights Act. The Attorney General objected to the implementation of a proposed at-large method of electing city councilmen.

Notwithstanding the Attorney General's objection, the City scheduled an at-large election. The United States instituted suit and a three-judge court unanimously held that Sheffield was not a "political subdivision" as that term is defined in § 14(c)(2) of the

Voting Rights Act, and that therefore, Section 5 of the Act did not apply to SHEFFIELD.[3]

This Court in a split decision reversed the three-judge district court with the majority holding that Section 5 of the Act did apply to Sheffield. The legislative history and intent of Congress were thoroughly discussed in both the majority and dissenting opinions. We have read and re-read that decision and we do not find anything therein that leads to the conclusion that it contains any authority that Section 5 of the Act applies to the Dougherty County, Georgia Board of Education.

The majority in SHEFFIELD stated on page 158,

> "The language, structure, history and purposes of the Act persuade us that § 5 like the constitutional provisions it is designed to implement, *applies to all entities having power over any aspect of the electoral process within designated jurisdictions,* not only to counties or to whatever units of state government perform the function of registering voters." (emphasis supplied)

The Dougherty County, Georia Board of Education has no power over the electoral process.

Again the majority stated on page 160,

> "Since jurisdictions may be designated under § 4 by reason of the actions of election officials who do not register voters, and since § 4(a) imposes duties on all election officials whether or not they are involved in voter registration, it appears to follow necessarily that *§ 5 has to apply to all entities exercising control over the electoral processes within the covered States or subdivisions.*" (emphasis supplied)

[3] United States v. Board of Commissioners of Sheffield, Alabama, et al., 430 F.Supp. 786.

The Dougherty County Board of Education does not exercise any control over the electoral process.

No case has been found which can be remotely considered as substantiating the decision of the three-judge district court. *Allen* v. *Board of Elections,* 393 US 544, 22 L Ed 2d 1, 89 S Ct. 817 (1969) does not support the proposition that a political subdivision that exercises no control over the electoral process is covered under Section 5 of the Act, but rather ALLEN substantiates this Court's holding in SHEFFIELD, supra, that an entity must exercise control over electoral processes to be a covered "political subdivision." ALLEN actually involved four cases which were consolidated in this Court; these cases being *Allen, et al.* v. *State Board of Elections, et al.; Fairley, et al.* v. *Patterson, et al.; Bunton, et al.* v. *Patterson, et al.;* and *Whitley, et al.* v. *Williams, et al.* In FAIRLEY, the Missippi Code was amended to provide that the Board of Supervisors of each county could adopt an order providing that board members be elected at large by all qualified electors of the county. Prior thereto all counties were divided into five districts, with each district electing one member of the board of supervisors. Clearly, this legislative amendment involved an exercise of control over the electoral process. BUNTON was an amendment to the Mississippi Code providing that in eleven (11) specified counties, the County Superintendent of Education should be appointed by the Board of Education. Prior to the amendment the eleven counties had the option of electing or appointing the superintendent. Again, this legislative change involved an exercise of control over the electoral process of eleven counties in Mississippi. WHITLEY also involved an amendment to the Mississippi Code, which amendment

changed the requirement for independent candidates running in general elections. This change also involved an exercise of control over the electoral process of the State of Mississippi. ALLEN concerned a bulletin issued by the Virginia Board of Elections to all election judges attempting to modify the provisions of the Code of Virginia. No one will seriously dispute that the Virginia Board of Elections does exercise some control over electoral process within the State of Virginia.

The case of *Georgia* v. *United States,* 411 US 526, 36 L Ed 2d 472, 93 S Ct. 1702 (1973) involved the reapportionment of the Georgia House of Representatives by the Georgia Legislature. This was a law that clearly affected voting and did involve control over the electoral process of the State of Georgia.

There are cases which hold that Section Five's preclearance requirement applies to changes in the law or procedure affecting the location of polling places, *Perkins* v. *Matthews,* 400 US 379, 27 L Ed 2d 476, 91 S Ct 431 (1971); *Annexations, City of Richmond* v. *United States,* 422 US 358, 45 L Ed 2d 245, 95 S Ct. 2296 (1975); changing of the date by which a declaration of candidacy must be filed, *Hadnott* v. *Amos,* 394 US 358, 22 L Ed 2d 336, 89 S Ct 1101 (1969); enlargement of the distance from the polling places within which campaigning is allowed, *Clayton* v. *North Carolina State Board of Elections,* 319 F Supp 915 (Ed NC 1970). However, all of these involve a political subdivision that exercised control over the electoral processes.

Mr. Justice Powell stated on page 172 in the case of *United States* v. *Board of Commissioners of Sheffield, Alabama,* supra,

> "I agree with the court that a more sensible construction of § 5, in view of and in accord with the statute's purpose, is to treat the *governmental units responsible for changes in the electoral process* within a designated State or political subdivision as the equivalent of the State or political subdivision . . ." (emphasis supplied)

It is clear that the Dougherty County, Georgia Board of Education, while a governmental unit, is not responsible for and does not cause, directly or indirectly, any changes in the electoral process within the State of Georiga, and, therefore, is not the equivalent of the State of Georgia. Therefore, Section 5 of the Voting Rights Act of 1965, as amended, does not apply to the Dougherty County, Georgia Board of Education.

B.

Section 5 Of The Voting Rights Act Of 1965, As Amended, Does Not Apply To A Rule Adopted By A Board Of Education Providing That An Employee Becoming A Candidate For Elective Political Office Must Take Prescribed Leaves Of Absence Without Pay.

Should the Court conclude that the Dougherty County, Georgia Board of Education is such a political subdivision as to be governed by Section 5 of the Act, then it must resolve the question of whether or not Rule 58 of the Board of Education is covered by Section 5 of the Act.

The key to § 5 is the words "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting", and in order for Rule

58 to come within the provisions of § 5 it must come within the meaning of such words. Rule 58 is as follows:

> "POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absense, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

The Dougherty County, Georgia Board of Education could not, if it wanted to, enact or administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. It does not involve a voting qualification or prerequisite to vote, nor does it establish a standard, practice or procedure with respect to voting. It simply provides that any employee of the Dougherty County School System would be required to take a leave of absence, without pay, during the time he or she is actually engaged in political activity.

Congress did not intend for political subdivisions that had no control over any facet of elections to have to clear every internal matter through the Attorney General or through the United States District Court for the District of Columbia. The decision of the District Court would require such action on the part of all political subdivisions that adopt reasonable rules governing the conduct of its employees as pertains to political activity. Rule 58 was a means of getting a full days work for a full days pay—nothing more and nothing less.

CONCLUSION

The Dougherty County, Georgia Board of Education is not a political subdivision that is covered by Section 5 of the Voting Rights Act. Rule 58 of the Dougherty County, Georgia Board of Education is an effort to resolve an internal matter of the Board. It does not establish a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting and, therefore, is not subject to the preclearance provisions of Section 5.

The decision of the lower court should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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Appellants,

v.

JOHN E. WHITE

Appeal from the United States District Court for the Middle District of Georgia, Albany Division

---

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v.

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Appeal from the United States District Court for the Middle District of Georgia, Albany Division

---

BRIEF FOR APPELLEE

STATEMENT

Appellee does not quarrel materially with the Statement of the Case as presented in the Brief for Appellants.

ARGUMENT

Introduction

The question presented on this appeal is whether a public school system's newly adopted rule requiring that employees must take leave without pay in order to run for, or serve in, public office, must be submitted for preclearance pursuant to Section 5 of the Voting Rights Act of 1965. (The three-judge district court held that Section 5 applies, and that the rule therefore must be submitted

for pre-clearance either to the Attorney General of the United States, or to the United States District Court for the District of Columbia in a declaratory judgment action.) This case does not involve a determination whether the rule in question has the purpose or effect of discriminating on the basis of race; initial determination of that "substantive" inquiry, under the Voting Rights Act, is the province of the Attorney General or the District Court for the District of Columbia.

I

RULE 58 OF THE DOUGHERTY COUNTY BOARD OF EDUCATION CONSTITUTES CONTROL OVER THE ELECTORAL PROCESS AND IS FOR THAT REASON A "COVERED CHANGE" WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 [1]

If the adoption by Appellant Dougherty County Board of Education on June 12, 1972 of its Rule 58 (requiring employees who run for office to take unpaid leave during their candidacy or tenure) was a "covered change" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, then the Rule should not have been applied to Appellee until it had either been submitted and approved by the Attorney General of the United States, or declared valid and nondiscriminatory in an action brought by Appellants in the United States District Court for the District of Columbia. The question of the Act's coverage, therefore, is determinative of Appellee's right to some judicial remedy respecting Rule 58.[2]

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[1] Appellee has reversed the order of questions presented and argued by Appellants because the question of "covered entity" is readily resolved if Rule 58 is a "covered change." On the other hand, if Rule 58 is not a "covered change," then the "covered entity" issue need not be reached.

[2] It should be noted that the question of appropriate remedy was remanded by the court below to the originating single judge. Appendix [hereinafter, "App."] 36a. In his Complaint, Appellee sought declaratory and injunctive relief and also an award of back pay to compensate him for sums he allegedly lost because Rule 58 was applied to him; jurisdiction was claimed not only pursuant to the Voting Rights Act but also under 28 U.S.C. §§ 1343(3) and (4) and 1331 to enforce rights protected by 42 U.S.C. § 1983, the Fourteenth and Fifteenth Amendments to the Constitution. App. 2a-3a, 6a-7a.

This Court's decisions during the past ten years have given "the broadest possible scope" to the coverage of Section 5. In *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969), this Court interpreted Section 5 to require prior federal scrutiny of "any state enactment which altered the election law in a covered state [3] in even a minor way." *See also, Perkins* v. *Mathews*, 400 U.S. 379, 387-94 (1971). Later decisions of this Court have held that this "broad" application of Section 5 (first stated in *Allen*) has been subsequently ratified by the Congress in the 1970 and 1975 extensions of the Voting Rights Act. *E.g., Georgia* v. *United States*, 411 U.S. 526, 533 (1973); *see also, Beer* v. *United States*, 425 U.S. 130 (1976).

Most recently, the controlling principle of construction was formulated by this Court in *United States* v. *Board of Comm'rs of Sheffield*, 46 U.S.L.W. 4189 (March 6, 1978),[4] as follows:

> [Section 5 applies to] *all entities having power over any aspect of the electoral process* within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters. (*Id.* at 4191) (emphasis added).
>
> . . . it appears to follow necessarily that § 5 has to apply to *all entities exercising control over the electoral processes* within covered States or subdivisions. (*Id.* at 4192) (emphasis added).

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[3] As Appellants concede, there is no question that the entire State of Georgia is a "covered" State. Brief for Appellants, at 14.

[4] Hereinafer cited as *"Sheffield."*

While *Sheffield* directly involved only the "covered entity" issue, this Court's rulings since *Allen* v. *State Bd. of Elections*, *supra*, have consistently rejected the argument that there are any *de minimis* or "local matter" exceptions to the "election law change" coverage of Section 5. For example, *Allen* involved write-in procedures in connection with a change from paper ballots to machine voting; *Fairley* v. *Patterson* (decided with *Allen*), a statute authorizing county governing bodies to adopt at-large voting schemes; *Perkins* v. *Mathews*, *supra*, the location of polling places; *Hadnott* v. *Amos*, 394 U.S. 358 (1969), the date for filing notice that an individual intended to become a candidate.

As this Court noted in *Sheffield*, 46 U.S.L.W. at 4194, the fact that Section 5 coverage extends to even the most minor and subtle changes in the electoral mechanism within a "covered State" is a reflection of the constitutional underpinnings of the Voting Rights Act:

> One would expect that the substantive duties imposed in the Act, as in the constitutional provisions that it is designed to implement, would apply not only to governmental entities formally acting in the name of the State, but also to those political units *that may exercise control over critical aspects of the voting process.* (emphasis added.)

Just as the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), so Section 5 coverage attaches to any enactment controlling the electoral process, whether or not it is called a "voting" change.

Rule 58 Addresses the Electoral Process

Appellants argue that the Dougherty County Board of Education's Rule 58 is a personnel policy, not a regulation of the electoral process, and is therefore not subject to the

Voting Rights Act. But even if a regulation is intended to accomplish some permissible purpose outside the sphere of candidacy and voting, it is subject to Section 5 if it constrains the electoral process. *See, e.g., Perkins* v. *Mathews*, *supra*. Moreover, the assertion that Rule 58 is simply "a means of getting a full day's work for a full day's pay—nothing more and nothing less," Brief for Appellants, at 20, is supported neither by the language of the Rule nor by the purported justification for its adoption.

On its face, Rule 58 addresses the conditions under which an individual who happens to be an employee of the Dougherty County Board of Education may stand for office; it says nothing about "a day's work for a day's pay." App. 3a-4a, 9a (#5). The fact that Rule 58 requires *elected* but not appointed public officials to take leave without pay also is inconsistent with Appellants' argument that it was adopted as a personnel measure. Nor was it adopted because the Board had experienced problems because of absences from duty on the part of staff participating in political campaigns. Appellee is the *only* employee who has ever run for office, App. 12a, 16a (#5); the announced justification for the rule did not include any reference to problems with Appellee or any other employee in connection with political campaigns or public service, App. 12a, 14a (#4). Instead, Appellants claim only that

> . . . the Board of Education deemed it necesary to have a rule which would set forth the policy of the Board pertaining to personnel within the school system *offering for elective office and serving in an elective office if elected thereto.*

App. 16a (#4) (emphasis added). Under these circumstances, the characterization of Rule 58 as a "personnel policy" no more avoids Section 5 coverage than did the claimed justifications that inadequate space required a

change in polling places, *see Perkins* v. *Mathews*, 301 F. Supp. 565, 568 (S.D. Miss. 1969), *rev'd* 400 U.S. 379 (1971), or that the possibility of "disruption" necessitated a change in the permissibility of electioneering between 50 and 500 feet from the polls, *see Clayton* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 915, 920-21 (E.D.N.C. 1970) (three-judge court).

There are ample means available to Appellant Board of Education, which has its employees under contract, to enforce its right to obtain "a full day's work for a day's pay." For example, if it has not already done so, the Board may adopt policies governing absences from school grounds during working hours—both with and without leave. What it may not do, however, without prior approval of the Attorney General or the United States District Court for the District of Columbia, is to adopt a Rule explicitly addressing itself to the electoral process.[5]

[5] The extent to which Rule 58 can be justified as a nonracial personnel regulation is also relevant to the substantive question to be determined by the Attorney General or the United States District Court for the District of Columbia; the purpose of the Voting Rights Act's pre-clearance requirement was to avoid the necessity of case-by-case adjudication. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313-14 (1966); *Sheffield*, 46 U.S.L.W. at 4191-92. Although this Court need not pass on the issue, it should not be overlooked that there are substantial reasons why Rule 58 is suspect.

First, the Rule was adopted within a month after Appellee had announced his initial candidacy for a legislative seat. Second, the Board had no experience suggesting that employee participation in election campaigns would causes absences from duty. No Board of Education employee had previously run for office. Third, there is a history of racial discrimination affecting voting in Dougherty County. For instance, in 1972 when Appellee first stood for office, legislative elections were on an at-large basis. The Attorney General eventually objected under Section 5 to this districting scheme and ultimately the General Assembly of Georgia adopted a modified plan which provided for a single-member district, for which Appellee campaigned successfully in 1974. *See* U.S. Comm'n on Civil Rights, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975), at 230-34. Regarding recent voting rights litigation in the City of Albany, the

Because Rule 58 Is a Barrier to Access to the Electoral Process, It Is a Covered Change Under Section 5

An analysis of this Court's Section 5 rulings demonstrates that one indicator of a "covered change" is that it increases the difficulty of obtaining access to a position on the ballot. In *Whitley* v. *Williams* (a companion case decided with *Allen* v. *State Bd. of Elections*, *supra*), this Court held that Section 5 coverage extended to changes which "appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot." 393 U.S. at 570. This "Whitley rule" was subsequently applied in *Hadnott* v. *Amos*, *supra*, which involved changes in the filing deadlines for independent candidates. In *Hadnott* this Court ruled that "[t]he increased barriers placed on independent candidates by Alabama's Garrett Act likewise bring it within the purview of § 5 of the Federal Act." 394 U.S. at 366. *See also*, *Sumter County Executive Comm.* v. *Dearman*, 514 F.2d 1168 (5th Cir. 1975).

This Court has consistently recognized that the character of regulations which touch upon the electoral process

county seat of Dougherty County, *see Paige* v. *Gray*, 339 F. Supp. 459 (M.D. Ga. 1975), *vacated*, 538 F.2d 1108 (5th Cir. 1976), *on remand*, 437 F. Supp. 137 (M.D. Ga. 1977). Finally, the Attorney General or the U.S. District Court should consider the extent to which, historically, public school teaching has been one of the few professions open to Blacks in Georgia, so that a rule like the one in issue here has a far greater impact upon potential educated, articulate Black candidates than upon whites. For example, the 1970 Census reported that of 208,433 Georgia residents whose occupations fell into the "professional" classification, 53.8% of the Blacks were employed as elementary and secondary school teachers, compared to only 21.2% of the white "professionals." Black citizens constituted 25.2% of the State's teaching force but only 11.7% of the State's total "professional" workforce, as reported in the census. U.S. Bureau of the Census, CENSUS OF POPULATION: 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C12, GEORGIA, at Table 54.

must be measured realistically with a view to their impact, and that financial barriers to candidacy affect that process in a direct and forceful fashion. Thus, this Court has invalidated certain candidate qualifying fee schemes under the Fourteenth Amendment under a standard of "close scrutiny" triggered by appreciation of the practical fact that voting rights were implicated by such schemes. The Court said that an unrealistically high qualifying fee (without an alternative method for qualifying) "tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time, it gives the affluent the power to place on the ballot their own names or the names of persons they favor. . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1971). *See also*, *Lubin* v. *Panish*, 415 U.S. 709 (1974). Similarly, this Court has struck down property ownership requirements for public officeholding. In *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970), this Court held unconstitutional a Georgia state law requiring that members of county boards of education be "freeholders" because citizens "do have a constitutional right to be considered for service without the burden of invidiously discriminatory disqualifications." *See also*, *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969) (right to cast ballot); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) (same). Finally, the principle has been applied in cases challenging at-large redistricting plans as racially discriminatory. In *White* v. *Regester*, 412 U.S. 755, 765-70 (1973), this Court recognized that where there is a history of racial discrimination in voting and minority citizens have not been able in at-large contests to elect minority candidates to public office, a finding that the political processes are not equally accessible to non-minority and minority groups is appropriate and single-member-district plans may be required.

Accord, e.g., *Parnell* v. *Rapides Parish School Bd.*, 563 F.2d 180 (5th Cir. 1977); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 142-46, 148-51 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3357 (1977).

In each of its cases, as in the earlier "white primary" rulings,[6] this Court has utilized a pragmatic, not a formalistic, test to determine whether the challenged practice constituted part of the electoral process. Under the same sort of realistic, practical approach, the Dougherty County Board of Education's Rule 58 directly controls the political process by making it more difficult for at least some potential candidates to qualify. School Board employees must be willing to endure the financial sacrifice of foregoing wages during the period of campaigning and serving in an elected post. Thus, although the School Board does not conduct elections, its adoption of Rule 58 creates substantial additional burdens for potential candidates interested in running for office if they are school system employees,[7] notwithstanding the employees' ability or willingness to undertake continued full performance of their employment responsibilities.

Even though Rule 58 does not apply to all candidates for elective office, then, it does directly control elections since on its face it limits and impedes the ability of school system employees to run for elective office.[8] Thus Rule 58 is a "covered change" under Section 5.

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[6] *E.g.*, *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[7] This is particularly true for Black citizens of the county. *See* note 5 *supra*.

[8] Although Appellee has in the past made the necessary financial sacrifice to stand for office, there can be no doubt that Rule 58 continues to impose a severe burden on Appellee and other school system employees faced with the decision whether to run. *Cf. Allen* v. *State Bd. of Elections*, *supra*, 393 U.S. at 553 (action challenging rule forbidding use of gummed stickers for "write-in" candidates may be maintained for prospective relief even though counting of

The Voting Rights Act Was Intended to Subject to Scrutiny Precisely the Sort of Barrier to Candidacy Imposed by Rule 58

Economic reprisals for participation in the electoral process have long been an abuse Congress has sought to eliminate. In the Civil Rights Act of 1957, Congress responded to this discriminatory practice with the enactment of 42 U.S.C. § 1971b, concerning intimidation of voters. Notwithstanding the broad judicial interpretation of this statute to encompass economic reprisals,[9] the problem persisted, as documented by the reports of the United States Civil Rights Commission. U.S. Comm'n on Civil Rights, WITH LIBERTY AND JUSTICE FOR ALL 47 (1959); [10] U.S. Comm'n on Civil Rights, VOTING 190 (1961).[11] Submitting his proposed civil rights legislation to Congress in 1963, President Kennedy specifically noted the continuing economic retaliation against Black citizens exercising their constitutional rights.[12]

In the United Sttaes Civil Rights Commission's 1975 report on the Voting Rights Act, the Commission cited

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disputed ballots in election in which rule applied would not affect result).

[9] *United States* v. *Board of Educ. of Greene County*, 332 F.2d 40 (5th Cir. 1964); *United States* v. *Beaty*, 288 F.2d 653 (6th Cir. 1961); *United States* v. *Bruce*, 353 F.2d 474 (5th Cir. 1965).

[10] "Factors that discourage or prevent Negroes from registering to vote, include in some places, the fear of bodily harm and loss of jobs."

[11] "In several counties, Negro teachers are warned to refrain from taking too active an interest in political matters upon pain of losing their jobs. An even more widespread inhibiting factor is fear of physical or economic reprisal."

[12] "Too often those who attempt to exert their constitutional rights are intimidated. Prospective registrants are fired." Message of February 28, 1963, PUBLIC PAPERS OF THE PRESIDENTS, John F. Kennedy, 1963, at 223, as quoted in *Hearings on Civil Rights before Subcommittee No. 5 of the House Judiciary Committee*, 88th Cong., 1st Sess. 927 (1963).

numerous examples of economic retaliation against teachers and school board employees participating in the electoral process. U.S. Comm'n on Civil Rights, THE VOTING RIGHTS ACT: TEN YEARS AFTER 185, 189, 191, 193-95, 197 (1975), and the legislative history of the Voting Rights Act of 1965 and the 1975 extension reflect Congressional concern over this seemingly intractable problem.[13] The general language of Section 5, and Congress' endorsement of this Court's broad construction of that provision in *Allen* and other cases, see p. 3 *supra*, thus reflect its desire to eliminate—or at the least to subject to scrutiny—any economic sanctions for political activity by minority citizens.

The Attorney General Has Interpreted Section 5 of the Act to Cover Rule 58

The conclusion that Rule 58 is a "covered change" subject to Section 5 pre-clearance is further buttressed by the administrative interpretation of the statute by the Attorney General. Pursuant to duly adopted regulations,[14] the Attorney General requested that the Dougherty County Board of Education submit Rule 58 for Section 5 preclearance. App. 28a.[15] The request was ignored by the Appellant School Board, and Rule 58 has never been submitted for Section 5 review. App. 19a (#6).

The central role of the Attorney General in interpreting Section 5 was discussed at length by this Court in *Sheffield*, *supra*, 46 U.S.L.W. at 4195; that interpretation has consistently been afforded great deference. *See Per-*

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[13] *See* H.R. REP. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. CODE CONG. & ADM. NEWS 2437, 2452; S. REP. No. 94-295, 94th Cong., 1st Sess. 26 (1975), *reprinted in* [1975] U.S. CODE CONG. & ADM. NEWS 774, 792.

[14] 28 C.F.R. §§ 51.1-51.29 (1977).

[15] Although not printed in the Appendix, the date shown on the letter request of the Attorney General is August 26, 1976. *See* App. 26a (#3).

kins v. *Mathews*, *supra*, 400 U.S. at 390-91; *Georgia* v. *United States*, *supra*, 411 U.S. at 536-41. Here, the order of the three-judge court is congruent with, and in effect enforces, the ruling of the Attorney General with respect to coverage. That Order should be affirmed.

II

THE BOARD OF EDUCATION IS A "COVERED ENTITY" UNDER SECTION 5 OF THE VOTING RIGHTS ACT

As Appellee has demonstrated above, Rule 58 is a "covered change" subject to Section 5 pre-clearance because it amounts to "control over the electoral process." Appellants also argue that the court below erred because the Dougherty County School Board is not a "covered entity." However, this Term's ruling in *Sheffield* makes clear that if Rule 58 is a "covered change," then the School Board is a "covered entity."[16] There, this Court held that all "state actors" in a covered State (or a covered political subdivision) which exercise control over the electoral process must submit such changes for pre-clearance pursuant to Section 5. The Voting Rights Act applies "territorially" within such States or subdivisions and is not limited to entities which conduct voter registration or elections.

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[16] The former question turns, as set out above, on whether Appellant Board of Education exerts "control over the electoral process" when it, *inter alia*, adopts regulations such as Rule 58. The answer is clearly that it does—and while Appellants correctly assert that no previous decision is precisely on all fours with the situation here presented, they ignore the fact that there is no reported decision sustaining the exclusion from Section 5's pre-clearance requirement of any statute, ordinance or regulation which operates to burden access to the ballot.

Under Georgia law, there is no question that the Dougherty County Board of Education is a "political subdivision" of the State. *Ty Ty Consol. School Dist.* v. *Colquitt Lumber Co.*, 153 Ga. 426, 427, 112 S.E. 561 (1922); *Seaboard Air Line Ry.* v. *Wright*, 165 Ga. 367, 371, 140 S.E. 863, 865 (1927); *Campbell* v. *Rosebud Consol. School Dist.*, 186 Ga. 541, 548, 198 S.E. 225, 229 (1938); GA. CODE ANN. § 23-1715. As Appellants frankly admit, the "Board of Education is a political subdivision [of the State] charged with the responsibility of operating the public schools of Dougherty County, Georgia." Brief for Appellants, at 14-15. As such a political entity of the State of Georgia, it is a "state actor" for Section 5 purposes.

Here, the General Assembly of Georgia has chosen to delegate to local county boards of education the authority to administer local school systems. GA. CODE ANN. § 32-901. Since *Sheffield* answers in the negative the question whether an entity must register voters to be "covered" by Section 5, and since Rule 58 is a covered change, the fact that the School Board, rather than the State, adopted Rule 58 does not defeat Section 5 coverage. *Compare Fairley* v. *Patterson*, *supra*, 393 U.S. at 550 (local option statute allowing change to at-large elections).

As this Court stated in *Sheffield*, *supra*, once a State has been designated under Section 4(a), "all political units within it are subject to the pre-clearance requirement." 46 U.S.L.W. at 4149. *See also id.* at 4197 (Powell, J., concurring). Although a school board could not be the basic unit "designated" under Section 4(a), once a State or appropriate political subdivision has been so designated, then all entities exercising formal or informal control over the electoral process therein are subject to Section 5.

This result is wholly in accord with the legislative purpose to make unnecessary tedious litigation of each electoral process change in every jurisdiction, and to "shif[t] the advantages of time and inertia from the perpetrators of the evil to its victims." *Sheffield*, 46 U.S.L.W. at 4192. If this Court were to hold that Section 5 coverage turned on whether the challenged action were only of local rather than statewide application, a basic goal of uniformity in the administration of the Voting Rights Act would be lost. The scope of federal scrutiny over the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina* v. *Katzenbach*, *supra* note 5, 383 U.S. at 335, should not depend on the manner of a particular State's exercise, or delegation of the power to exercise, control over the electoral process. *Cf. Cooper* v. *Aaron*, 358 U.S. 1 (1958).

CONCLUSION

Affirmance of the judgment below will not subject every employment rule or practice of every school board or special-purpose district in covered States or political subdivisions to the pre-clearance requirement. Rather, the determination of Section 5 coverage turns on the specific facts of each case. *Cf. Bullock* v. *Carter*, *supra*, 405 U.S. at 149. Here, the rule in question explicitly addresses the electoral process and imposes a direct barrier to candidacy. Hence it clearly falls within the scope of Section 5. Reversal of the judgment below would insulate from scrutiny by the Attorney General even those practices of entities which, though they are neither election boards nor municipalities, may have very damaging effects upon the opportunities of Black citizens to become candidates for or serve in public office.

For these reasons, Appellee respectfully submits that the judgment below should be affirmed.

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FOR ARGUMENT

Supreme Court, U. S.
FILED
JUL 20 1978
MICHAEL RODAK, JR., CLERK

No. 77-120

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, ET AL., APPELLANTS

v.

JOHN E. WHITE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, ET AL., APPELLANTS

v.

JOHN E. WHITE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

In areas covered by Section 4 of the Voting Rights Act of 1965, 79 Stat. 438, as amended, 42 U.S.C. (and Supp. V) 1973b, Section 5 of the Act, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c, provides that changes in voting standards, practices, and procedures may not become effective until they have been precleared by the Attorney General or the United States District Court for the District of Columbia.

Under Section 12(d) of the Act, 79 Stat. 444, as amended, 42 U.S.C. 1973j(d), the Attorney General is authorized to bring suit to enjoin the enforcement of a voting change that should have been submitted for preclearance but was not. Accordingly, the Attorney General has a substantial interest in the compass of Section 5, as to both the kinds of governmental entities required to submit voting changes for preclearance and the kinds of governmental action that may affect voting in such a way as to be subject to preclearance.

QUESTIONS PRESENTED

1. Whether a rule requiring board of education employees to take unpaid leaves of absence while they campaign for or serve in elective political office is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965.

2. Whether voting changes adopted by a county board of education in a state designated for coverage under Section 4 of the Act must be precleared under Section 5 before they may become effective.

STATEMENT

The facts in this case are essentially undisputed (see Answer of Defendants (A. 8a-10a); Brief for Appellants 8-11). In May 1972, appellee, a black employee of appellant Dougherty County Board of Education, announced his intention to run for a seat

in the Georgia House of Representatives (A. 31a). He has since alleged that he was the first black to seek election to that office from Albany, Georgia (A. 4a). On June 12, 1972, a few weeks after appellee's public announcement of his candidacy, his employer, the Board of Education, adopted Rule 58, which provides (A. 18a, 32a):

> Political Office. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto.

In June 1972, appellee qualified, under Georgia election law, as a candidate for the Democratic primary. He was immediately required, under the newly-adopted Rule 58, to take a leave of absence without pay. Appellee was defeated in the primary election in August 1972 and thereafter returned to his employment with the Board of Education (A. 24a, 32a). In June 1974, appellee again qualified as a candidate for the Georgia House of Representatives. In August of that year, he won the Democratic primary and, in November, the general election. Under Rule 58, appellee was required to take an unpaid leave of absence from June 12, 1974 through November 18, 1974; he was reinstated to his employment with the Board of Education nearly two weeks after the November 5 election (A. 32a). In June 1976, appellee qualified as

a candidate to retain his seat in the state legislature. Under Rule 58, he took an unpaid leave of absence from the date of his qualification on June 8, 1976, through his Democratic primary victory in August 1976. When it became clear that appellee would be unopposed for reelection in November, he was reinstated to his employment with the Board of Education on September 8, 1976 (*ibid.*).[1]

On June 11, 1976, appellee brought this suit, alleging that Rule 58 was a "standard, practice, or procedure with respect to voting" that had been instituted by appellants without the preclearance required by Section 5 of the Voting Rights Act and that the Rule was therefore unenforceable (A. 5a). A three-judge district court was convened. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 563. The court held that Rule 58 should have been submitted for preclearance under Section 5. Relying on this Court's decisions in *Allen* and in *Georgia* v. *United States*, 411 U.S. 526, the court characterized Section 5 as "an all encompassing protection against abridgement of an *effective* vote" (A. 35a). In particular, the court said, Section 5 applies to any "modification[] of the political process * * * which restricts the ability of citizens to run for office" (*ibid.*). The court reasoned that

[1] The Georgia General Assembly sits for approximately two and a half months at the beginning of each year. Although not reflected in the record, appellee apparently was required to take unpaid leaves of absence from his Board of Education employment during his service at the 1975, 1976, 1977, and 1978 legislative sessions.

"[b]y imposing a financial loss on [Board of Education] employees who choose to become candidates, [Rule 58] makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives" (*ibid.*). On this basis, the court concluded that Rule 58 should have been submitted for preclearance. Because of appellants' failure to make such a submission and obtain preclearance from the Attorney General or the United States District Court for the District of Columbia, the court enjoined further enforcement of Rule 58.

SUMMARY OF ARGUMENT

Rule 58 is a "standard, practice, or procedure with respect to voting" and therefore must be submitted for preclearance under Section 5 of the Voting Rights Act. This Court has held that Section 5 applies to changes affecting candidate qualification (see *Allen* v. *State Board of Elections*, 393 U.S. 544; *Hadnott* v. *Amos*, 394 U.S. 358), and Congress has approved that interpretation in its most recent extension of the Act. S. Rep. No. 94-295, 94th Cong., 1st Sess. 16-17 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9-10 (1975).

Although the Attorney General, in executing his responsibilities under the Act, has had little experience with provisions like Rule 58, and although in most circumstances the Attorney General might well interpose no objection to such a rule, any provision

affecting the requirements for candidacy should be subject to preclearance under Section 5. Rule 58 erects financial barriers to employees of appellant Board of Education who may wish to seek elective office and thus has a potential effect on the choices actually presented to the voters. Accordingly, the rule must be submitted for preclearance, regardless of appellants' estimate of the probability that the Attorney General will not object to its enforcement.

Whatever may be the situation in this case, there exists at least the possibility that rules like Rule 58 may have a racially discriminatory purpose or effect. If the percentage of black professionals employed by a school board or other public entity is substantially higher than the percentage of white professionals employed by the same body, a rule restricting the political activity of the body's employees may have a disportionate impact on blacks. Moreover, the timing of Rule 58's adoption in this case—less than a month after appellee announced his candidacy for the state legislature—suggests that a racially motivated board of education could use such a rule to discourage black employees from running for office. Because a rule like Rule 58 could have the purpose or effect of "abridging the right to vote on account of race or color" and thereby restricting black access to the political process, such a rule is a "standard, practice, or procedure with respect to voting" within the meaning of the Act and should be submitted for preclearance under Section 5.

2. Appellant Board of Education is a political unit within a state covered by Section 4 of the Voting Rights Act and therefore must obtain preclearance under Section 5 when it adopts a change that affects voting. This Court held in *United States* v. *Board of Commissioners of Sheffield, Alabama*, No. 76-1662, decided March 6, 1978, that in states covered under Section 4, the preclearance requirements of Section 5 apply to all voting changes adopted by "political units that may exercise control over critical aspects of the voting process" (slip op. 15). Appellants seek to distinguish that case on the ground that, unlike the City of Sheffield, appellant Board of Education "has no direct or indirect functions in connection with election of public officers" (Br. 15). But whether a political unit itself conducts elections is essentially irrelevant to the purposes of Section 5. The critical factor is control over the electoral process.

In adopting Rule 58 and establishing disincentives to its employees' participation in political campaigns, appellant Board of Education demonstrated and exercised its ability to influence the identity of the candidates for the state legislature from Dougherty County. The district court correctly held that this practical effect was sufficient to require that Rule 58 be submitted for preclearance under Section 5. Any other result would create a possibility that the provisions of the Act could be circumvented merely by delegation of control over various aspects of the electoral system to a political entity that does not itself con-

duct elections. Such a development would run counter to the purpose, legislative history, and judicial interpretations of Section 5, and should not be permitted by this Court.

ARGUMENT

I

RULE 58 IS A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING" AND THEREFORE IS SUBJECT TO THE PRECLEARANCE REQUIREMENTS OF SECTION 5

Section 5 of the Voting Rights Act of 1965 requires that, in states or political subdivisions covered by Section 4(b) of the Act, new standards, practices, or procedures with respect to voting may not become effective unless they have been precleared by the United States District Court for the District of Columbia or the Attorney General. Congress has expansively defined the term "voting," as it is used in the statute. Section 14(c)(1) of the Act, 79 Stat. 445, 42 U.S.C. 1973*l*(c)(1), provides that voting "shall include all action necessary to make a vote effective in any primary, special, or general election * * *." Neither Section 5 nor Section 14 nor any other portion of the statute, however, elaborates on the meaning of the phrase, "standard, practice, or procedure with respect to voting."

In upholding the constitutionality of the Voting Rights Act, this Court declared that Congress had designed the statute "to banish the blight of racial discrimination in voting, which has infected the elec-

toral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308. Three years later, in *Allen* v. *State Board of Elections*, 393 U.S. 544, 563-571, the Court grappled for the first time with the basic question presented here, namely, what sort of measures did Congress intend to embrace within the words "standard, practice, or procedure with respect to voting." *Allen* held that the critical language of Section 5 should be broadly construed in order to effectuate the "articulated purposes of the legislation" (393 U.S. at 570). The Court stated that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way" (*id.* at 566).

Appellees in the three Mississippi cases consolidated with *Allen* argued that Section 5 should not be read to cover "state rules relating to the qualification of candidates" (393 U.S. at 564). (*Whitley* v. *Williams*, one of the consolidated cases, involved four state statutory revisions that made qualification as an independent candidate substantially more difficult.) In rejecting appellees' argument, the Court stressed that the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race" (*id.* at 565). By placing additional obstacles in the path of prospective independent candidates, the Court reasoned, the changes at issue in

Whitley might "undermine the effectiveness" of voters who wish to elect persons not affiliated with any political party (*id.* at 570). Accordingly, the Court determined that further enforcement of the disputed statutory revisions should be enjoined pending their submission and preclearance under Section 5.

In the 1975 extension of the Voting Rights Act, Congress expressly approved *Allen* and the broad interpretation it gave to the scope of Section 5. See S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975). Both the House and Senate Judiciary Committees were aware that preclearance had been required for changes affecting candidate qualification and both committees specifically mentioned increased candidate filing fees as an example of the kind of change to which the Attorney General had interposed an objection. S. Rep. No. 94-295, *supra*, at 17; H.R. Rep. No. 94-196, *supra*, at 10. Moreover, both committees relied heavily on the 1975 report of the United States Commission on Civil Rights entitled *The Voting Rights Act: Ten Years After*. That report (at 131-203) documented at length the problems faced by minority candidates who had attempted to qualify for office.

In cases decided after *Allen*, this Court and other federal courts have adhered to the principle that changes affecting prerequisites for candidacy must be submitted for preclearance under Section 5. For example, in *Hadnott* v. *Amos*, 394 U.S. 358, the Court considered a newly-enacted Alabama law that required

prospective independent candidates to declare their intention to seek public office more than two months earlier than previously necessary. Finding the controlling question indistinguishable from that presented in *Whitley*, the Court held that the new statute could not be enforced until precleared under Section 5 (394 U.S. at 366). Similarly, three-judge district courts in *Waide* v. *Waller*, 402 F. Supp. 922, 924-925 (N.D. Miss.), and *United Ossining Party* v. *Hayduk*, 357 F. Supp. 962, 966 (S.D. N.Y.), concluded that the requirements of Section 5 apply to changes in the standards governing qualification as a political candidate.[2] The *Waide* court declared (402 F. Supp. at 925):

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[2] The Mississippi law at issue in *Waide* required that an attorney be admitted to practice before the state supreme court for a period of two years before he could seek election as a local district attorney. Although enacted in 1966, the statute had not been submitted for preclearance at the time Waide filed his complaint in 1975. During litigation in the district court, Mississippi submitted the statute to the Attorney General under Section 5. Seventeen days before the district court issued its opinion and judgment, the Attorney General notified the court by telegram that he would interpose no objection to the law. 402 F. Supp. at 925.

United Ossining Party involved a New York law that placed certain restrictions on cross-endorsements of candidates for public office. The challenged amendment to New York's Election Law provided that "no candidate for an office other than a judicial or statewide office shall be eligible to receive the nomination and to appear on the ballot as the candidate of both a political party and an independent group or body" (357 F. Supp. at 964). The court held that the new statute could not be enforced because it had not been precleared under Section 5 (*id.* at 966).

> A statute which makes more stringent the requirements for political candidacy and thus limits to some extent the electorate's ability to choose does impact on voting rights in a fashion within the contemplation of § 5, and is, therefore, subject to § 5 provisions.

The decisions in *Hadnott*, *Waide*, and *United Ossining Party* are part of a substantial body of precedent that has implemented a broad construction of Section 5 in response to the guidance provided by this Court in *Allen*. The preclearance requirements of Section 5 have been applied not only to changes affecting candidate qualification, but also to reapportionment plans (*Georgia* v. *United States*, 411 U.S. 526), changes in municipal boundaries through annexations of adjacent areas (*Perkins* v. *Matthews*, 400 U.S. 379, 388-390; see also *City of Richmond* v. *United States*, 422 U.S. 358), changes in the location of polling places (*Perkins* v. *Matthews*, *supra*, 400 U.S. at 387-388), and a wide variety of miscellaneous alterations in existing practices such as the procedures for casting a write-in vote, the permissibility of sample ballots in the voting booth, and the size of the vote required for election. See, *e.g.*, *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 552-553, 570; *Gilmore* v. *Greene County Democratic Party Executive Committee*, 435 F. 2d 487 (C.A. 5); *United States* v. *Cohan*, 358 F. Supp. 1217 (S.D. Ga.). The expansive interpretation of the statutory phrase, "standard, practice, or procedure with respect to voting," reflects this Court's admonition that "Section 5

is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters." *Georgia* v. *United States*, *supra*, 411 U.S. at 531.

The Attorney General's regulations under Section 5, adopted in 1971, also take an inclusive approach to the kind of changes covered by the statute. See 28 C.F.R. Part 51. The regulations state that "[a]ll changes affecting voting, even though the change appears to be minor or indirect," are subject to preclearance under Section 5. 28 C.F.R. 51.4(a). In particular, the Attorney General has specified that "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders * * *" (28 C.F.R. 51.4 (c)(4)) and "[a]ny change in the eligibility and qualification procedures for independent candidates" (28 C.F.R. 51.4(c)(5)) must be submitted for prior approval. This Court has stated that the Attorney General's interpretation of the Voting Rights Act is "persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States* v. *Board of Commissioners of Sheffield, Alabama*, No. 76-1662, decided March 6, 1978, slip op. 19-20. See also *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-394.

In carrying out his administrative and enforcement responsibilities under the Voting Rights Act,

the Attorney General has had little experience with provisions such as appellant Board of Education's Rule 58, at issue in this case.[3] Although Department of Justice records show that numerous changes affecting candidate qualification have been submitted to the Attorney General for preclearance, none of these submissions involved a state or local rule that imposed restrictions on the political activity of government employees. At least one state, after the effective date of its coverage under Section 4 of the Voting Rights Act, has enacted a law limiting political activity by employees included within the state's merit system. See Ga. Code Ann. § 40-2205 (1975 Rev.). This statute, in effect a state counterpart to the federal Hatch Act, 5 U.S.C. 7324, creates the position of State Commissioner of Personnel Administration and requires the Commissioner to submit to the Governor rules and regulations that "define and prohibit improper political activity" by state employees. Such regulations have apparently been submitted to and approved by the Governor (see *Herault* v. *Department of Human Resources*, 137 Ga. App. 446, 224 S.E. 2d 480), but neither the statute nor the regulations have

[3] Rule 58 came to the attention of the Department of Justice shortly before the commencement of this litigation when counsel for appellee contacted attorneys in the Voting Section of the Civil Rights Division. On August 26, 1976, two and a half months after appellee filed his complaint, Assistant Attorney General Pottinger wrote to the Superintendent of the Dougherty County School System and informed him that Rule 58 should be submitted for preclearance under Section 5 (A. 28a).

been submitted for preclearance under Section 5 and the Attorney General has not sought to enjoin enforcement of the political activity rules pending federal review.

This Court has expressed constitutional approval of the Hatch Act and of similar provisions in state law. See *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548; *Broadrick* v. *Oklahoma*, 413 U.S. 601; *United Public Workers of America (C.I.O.)* v. *Mitchell*, 330 U.S. 75. Save for the allegations in the present controversy, we are unaware of any suggestion in a litigated case that limitations on public employees' political activity serve to reduce minority access to the political process. Accordingly, it may fairly be supposed that, in the absence of special circumstances, state statutes or local rules like the one currently in dispute would be found not to have the purpose or effect of "denying or abridging the right to vote on account of race or color" and would therefore be precleared by the Attorney General if submitted under Section 5.

In attempting to establish that Rule 58 is not subject to preclearance under Section 5, appellants argue that the rule is "a means of getting a full days work for a full days pay—nothing more and nothing less" (Br. 20). But the fact remains that Rule 58 singles out political candidacy for special treatment; it is not a neutrally drawn, generally applicable work rule concerning absenteeism that equally affects political or

non-political activities. And, as this Court has frequently observed, the worthiness of a particular change with respect to voting or the likely fate of that change once submitted for preclearance is essentially irrelevant to the question whether the change must be submitted in the first place. See, *e.g.*, *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 571; *Georgia* v. *United States*, *supra*, 411 U.S. at 534.

Regardless, therefore, of whether the Attorney General would interpose an objection if Rule 58 were submitted to him under Section 5, appellants remain obligated to make such a submission. Furthermore, that obligation has not been suspended by the failure of the Attorney General to initiate Section 5 enforcement proceedings with respect to other comparable provisions not submitted for preclearance. As this Court recognized in *Perkins* v. *Matthews*, *supra*, 400 U.S. at 391-392 n. 10, "Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. * * * For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval."

Rule 58 is subject to the preclearance requirements of Section 5 because it imposes financial burdens on a particular group of prospective political candidates and thereby discourages members of that group from running for elective office. By erecting an additional barrier to the candidacy of board of education em-

ployees, the rule tends to restrict entry into political campaigns and thus to limit the choices available to Dougherty County voters. As the district court held (A. 35a), Section 5

> applies to modifications of the political process and all that that process entails, including the implementation of any policy * * * which restricts the ability of citizens to run for office.
>
> Rule 58 of the Dougherty County Board of Education is such a modification of the political process. By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives. As in *Allen*, *supra*, and *Hadnott*, *supra*, it is an "increased barrier" for a candidate and for that reason it is a "procedure with respect to voting" that is subject to the requirements of Section Five.

While it may be true, as suggested above, that the vast majority of provisions like Rule 58 would not prompt objection by the Attorney General, such rules do contain at least the potential for abuse. If, for example, black candidates are significantly more likely than white candidates to be drawn from the ranks of public employees, a provision like Rule 58 may place blacks at a substantial competitive disadvantage in seeking elective office and may seriously diminish citizens' opportunities to vote for black candidates. Indeed, in this case, appellee has presented census

statistics that indicate that black elementary and secondary school teachers comprise approximately 54 percent of all black professionals in Georgia, while white teachers comprise only slightly more than 21 percent of white professionals in the state. See Brief for Appellee 7 n. 5. A rule that discourages teachers from running for political office may thus have a disproportionate impact on the pool of potential black candidates.[4]

The timing of Rule 58's adoption also suggests the possibility that such a rule may be used for a racially discriminatory purpose. Appellant Board of Education adopted Rule 58 less than one month after appellee announced his candidacy for the state legislature. Appellee was the first black in recent years to seek election to that office from Dougherty County.[5] It is at least possible that, in imposing the unpaid leave of absence requirement on employees running for political office, the Board acted with the specific purpose of deterring appellee from continuing his campaign and that its reasons for doing so were related in part to appellee's race rather than his status as an employee. Appellee has alleged that he was the first employee of appellant Board of Education to seek elective office (Br. for Appellee 6 n. 5). Thus, it does not appear that Rule 58 was adopted in response to unfavorable experience with employee absenteeism attributable to participation in political campaigns.

Even if the rule at issue in this case was not racially motivated and would not "have the effect of denying or abridging the right to vote on account of race," the facts presented here are sufficiently suggestive of those possibilities to demonstrate that rules like Rule 58 should be subject to the preclearance requirements of Section 5. With respect to the public employees that they cover, such rules erect substantial barriers to candidacy for and service in political office. They thus directly affect public employees' decisions to

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[4] The United States Commission on Civil Rights, in its 1961 Report—*Voting* (Book 1), commented on the practice of economic retaliation against black teachers involved in attempts to improve black voter registration and participation in the political process. The Report stated (pp. 164, 190):

> A significant aspect of economic retaliation involves Negro teachers—who not only should be qualified to vote, but might be expected to be a source of leadership for the Negro community in general.
>
> * * * * *
>
> * * * In several counties Negro teachers are warned to refrain from taking too active an interest in political matters upon pain of losing their jobs.

The phenomenon described by the Civil Rights Commission is also reflected in reported decisions. See, *e.g.*, *Johnson* v. *Branch*, 364 F. 2d 177 (C.A. 4) (*en banc*), certiorari denied, 385 U.S. 1003, in which a local school board attempted to dismiss a black teacher who had worked in a voter registration drive and helped in the campaigns of her husband and her father for public office.

[5] For an historical discussion of segregation in Albany, Georgia, and a detailed description of the city's racially discriminatory electoral practices, see *Paige* v. *Gray*, 399 F. Supp. 459 (M.D. Ga.), vacated, 538 F. 2d 1108 (C.A. 5), on remand, 437 F. Supp. 137 (M.D. Ga.). Albany is the county seat of Dougherty County and contains approximately 80 percent of the county's population.

seek election and, in turn, the choice of candidates available to the voters. Because of their potential impact on the composition of the ballot, rules like Rule 58 are "standard[s], practice[s], or procedure[s] with respect to voting" within the meaning of Section 5 and they therefore may not be enforced until they have been precleared by the Attorney General or the United States District Court for the District of Columbia.

II

THE DOUGHERTY COUNTY BOARD OF EDUCATION IS A POLITICAL ENTITY WITHIN A STATE COVERED BY SECTION 4 OF THE VOTING RIGHTS ACT AND THEREFORE MUST OBTAIN PRECLEARANCE UNDER SECTION 5 WHEN IT ADOPTS A CHANGE THAT AFFECTS VOTING

In *United States* v. *Board of Commissioners of Sheffield, Alabama, supra*, this Court held that once a state has been designated for coverage under Section 4 of the Voting Rights Act, 42 U.S.C. (and Supp. V) 1973b, the preclearance requirements of Section 5 apply to all voting changes adopted within that state by "political units that may exercise control over critical aspects of the voting process" (slip op. 15). On August 6, 1965, the Attorney General and Director of the Census having made the necessary findings under Section 4(b), Georgia was designated as a covered jurisdiction under the Act.[6] As evidenced

[6] 30 Fed. Reg. 9897. See also *Georgia* v. *United States, supra*, 411 U.S. at 528 n. 1.

by its adoption of Rule 58, appellant Board of Education is a political unit whose actions may directly affect a critical aspect of the voting process, *i.e.*, the potential candidacy of a significant group of public employees. Accordingly, under *Sheffield*, the Board must submit Rule 58 and any other voting changes it adopts for preclearance under Section 5, even though the Board itself does not register voters and therefore is not a "political subdivision" within the definition of that term contained in Section 14(c)(2) of the Act, 42 U.S.C. 1973*l*(c)(2).

Appellants acknowledge, as they must, both the holding in *Sheffield* (Br. 15-16) and the status of the Board of Education as a political unit within a covered state (Br. 14). They contend, however, that because the Board "has no direct or indirect functions in connection with election of public officers" (Br. 15), no action of the Board, even if it constitutes a change in a "standard, practice, or procedure with respect to voting," can be subject to the preclearance requirements of Section 5. Appellants seek to distinguish *Sheffield* on the ground that, unlike the Board of Education in this case, the City of Sheffield does conduct elections and thus plainly exercises "control over the electoral processes" (slip op. 10).

Neither the language nor the legislative history of the Voting Rights Act supports the distinction appellants have attempted to draw. Preclearance under Section 5 is required whenever a political unit within a covered state adopts a change in a "standard, prac-

tice, or procedure with respect to voting." The political unit need not be one that itself conducts elections. No such limitation is explicitly stated in the Act, and none is fairly implied. This Court has properly interpreted Section 5 to give it "the broadest possible scope" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 567; see also *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* slip op. 11), and Congress, in its most recent extension of the period during which the Voting Rights Act is to be effective, stated unequivocally that "all changes affecting voting" must be precleared under Section 5. H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 58 (1975). See also the detailed discussion of legislative history in *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* slip op. 18-24.

Under this Court's decision in *Sheffield,* Section 5 applies to all governmental units "having power over any aspect of the electoral process within designated jurisdictions" (slip op. 6). By providing disincentives to its employees' participation in political campaigns, appellant Board of Education demonstrated and exercised its power over an aspect of the electoral process. If appellants' proposed restriction on the compass of Section 5 were correct and if rules adopted by the Board were not subject to preclearance, political entities within covered jurisdictions could circumvent the requirements of Section 5 simply by delegating legislative and administrative responsibilities for changes affecting voting to political bodies that do

not conduct elections.[7] This Court concluded in *Sheffield* that application of the preclearance procedure only to changes enacted by political units that register voters "would permit the precise evil that § 5 was designed to eliminate" (slip op. 13). Covered states could avoid the necessity for federal preclearance of voting changes by the simple expedient of "allowing local entities that do not conduct voter registration to control critical aspects of the electoral process" (*ibid.*). To an extent perhaps not as great but nonetheless real, if appellants' position in this case were accepted, the consequence would be "to nullify both § 5 and the Act in a large number of its potential applications" (*ibid.*).

Indeed, the primary motivation behind Section 5 was a congressional recognition that, in areas with a history of racially discriminatory voting practices, legislative efforts to eliminate discrimination would almost undoubtedly be met by attempts at evasion or nullification. Congress therefore began by identifying

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[7] Presumably such delegations themselves would be subject to preclearance, and appellants might argue that this initial federal scrutiny would ensure adequate consideration of the interests protected by Section 5. But a transfer of authority from one political unit to another would in all likelihood appear racially neutral on its face. Moreover, it might be comparatively easy to justify on grounds of governmental efficiency. Once approval for such a delegation was obtained, no further submissions under Section 5 would be required, under appellants' theory, because all voting changes would be adopted by an entity that did not itself conduct elections. Such a result is plainly not contemplated by the language, legislative history, or judicial interpretations of Section 5.

certain factors—low registration or voter turnout and prior use of a "test or device" as defined in Section 4(c) of the Act, 42 U.S.C. 1973b(c)—the coincidence of which would indicate a high probability of racial discrimination in a jurisdiction's electoral system. See S. Rep. No. 162, Part 3, 89th Cong., 1st Sess. 14 (1965); Hearings on S. 1564 (Civil Rights: Voting Rights) before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 1477 *et seq.* (1965); *United States* v. *Board of Commissioners of Sheffield, Alabama, supra*, slip op. 8; *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 329-332. In areas satisfying the coverage formula thus produced, Congress then provided not only that no test or device could be used to deprive any person of his right to vote, but also that no change in existing voting practices could be enforced unless first precleared by the Attorney General or the United States District Court for the District of Columbia.

In *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 335 (footnote omitted), this Court explained the circumstances that confronted Congress in 1965:

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.

Section 5 was the legislative response to this problem. As the Court observed in *Sheffield* (slip op. 10), "[b]y freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims."

Thus, in enacting Section 5, Congress sought to keep the electoral process free from new forms of discrimination. Whether a particular change in a standard, practice, or procedure with respect to voting is adopted by a political unit that does not itself conduct elections is a consideration essentially irrelevant to the purpose of Section 5. That provision's primary concern is the effect of voting changes on the electoral process, not the identity of the political unit responsible for the change's adoption or enforcement.

A change enacted by a jurisdiction that conducts elections is covered by Section 5 even if the change affects only elections conducted by entities other than the jurisdiction enacting the change. See, *e.g.*, *Pitts* v. *Busbee*, 511 F. 2d 126 (C.A. 5); *Bond* v. *White*, 508 F. 2d 1397 (C.A. 5) (both holding that state enactments affecting only county elections are subject to Section 5). Likewise, a jurisdiction seeking declaratory relief from coverage under Section 4(a) of the Act must demonstrate not only that no discriminatory test or device has been used in its own elections for the past five years, but also that no such test or device has been used during that period in any election con-

ducted by any political unit within the jurisdiction. See, *e.g.*, *Gaston County* v. *United States*, 288 F. Supp. 678, 691 (D. D.C.) (concurring opinion), affirmed, 395 U.S. 285. Appellants do not disagree. Yet, under their interpretation of Section 5, changes affecting another jurisdiction's elections would not be subject to preclearance if the enacting political unit did not itself conduct some elections. There is no justification for this anomalous result.

The applicability of Section 5 in this case should not turn upon peculiarities of state law regarding the method of selecting local boards of education. If appellant Board of Education conducted elections for the purpose of choosing its members or officers, appellants would apparently agree that voting changes adopted by the Board should be submitted for preclearance under Section 5. But because, in accordance with Georgia law (Ga. Code Ann. § 32-902 (1976 Rev.)), appellant Board of Education has been appointed by the Dougherty County grand jury,[8] appellants contend that Section 5 cannot apply. Appellants have pre-

[8] The 1976 Georgia Constitution provides that the grand jury of each county shall appoint the members of the county's Board of Education, unless a local law or local constitutional amendment approved by a majority of the county's voters authorizes election of the Board (see Ga. Code Ann. § 2-5302 (1977 Rev.)). While appellant Board is still appointed by the Dougherty County grand jury, several other Georgia counties have chosen to elect their boards of education. The Section 5 records of the Department of Justice indicate that submissions under Section 5 have been received from such elected boards of education.

sented no evidence that this limited statutory construction comports with congressional intent, and indeed no such evidence exists. If appellants were correct, the City of Sheffield, Alabama, which does conduct elections, would be required to obtain preclearance for a rule curbing the political activities of its employees in the elections of other jurisdictions, but appellant Board of Education's analogous rule would be immune from federal review under Section 5.[9] This arbitrary restriction on the scope of the Voting Rights Act should be rejected.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JULY 1978.

[9] Of course, if a private company were to adopt a rule prohibiting or regulating political activity by its employees, such a rule would not be subject to preclearance, because Section 5 applies in terms only to state action.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269560 78